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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 248

THE UNITED STATES OF AMERICA, APPELLANT

vs.

WILLIAM F. MONIA AND L. AUBREY WILLIAMS

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS**

FILED JULY 20, 1942

SUPREME COURT OF THE UNITED STATES

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vs.

WILLIAM F. MONIA AND L. AUBREY WILLIAMS

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1 [Caption omitted.]

3 In District Court of the United States, Northern
District of Illinois, Eastern Division

June Term 1941.

No. 32776

UNITED STATES OF AMERICA

v.

AMERICAN MEAT INSTITUTE; ARMOUR AND COMPANY; SWIFT AND
COMPANY; WILSON & Co., INC.; CHICAGO SUBCOMMITTEE OF THE
JOINT MARKETING-IMPROVEMENT COMMITTEE, SHEEP SECTION;
JOHN HOLMES; CHARLES R. HOOD; WILLIAM F. MONIA; WALTER
A. NETSCH; PAUL C. SMITH; L. AUBREY WILLIAMS; THOMAS E.
WILSON

Indictment

Filed June 19, 1941

The Grand Jurors of the United States of America, duly impaneled, sworn, and charged in the District Court of the United States for the Eastern Division of the Northern District of Illinois, at the May 1941 Term of said Court, having begun but not finished during said May 1941 Term, among other things, an investigation of the matters charged in this indictment; and having continued to sit by order of this Court in and for said Division and District during the June 1941 Term of said Court for the purpose of finishing investigations begun but not finished during said May 1941 Term; and inquiring within and for said District and Division at the June 1941 Term of said Court, do upon their oaths find and present as follows, to wit:

Each allegation hereinafter made in this indictment that an act has been done by any of the defendants herein or by any other person shall be deemed to be an allegation that such act was performed within the three years next preceding the date of the presentation of this indictment, unless otherwise expressly stated.

4 Wherever in this indictment it is alleged that any corporate or association defendant did any act or thing, such allegation shall be deemed to mean that each of the said individuals named herein as defendants or as co-conspirators and described as officers, agents, employees, or members of the said

corporate or association defendant, did authorize, order, or perform such act or thing.

THE DEFENDANTS

The following natural persons, associations, and corporations are hereby indicted and made defendants herein: American Meat Institute; Armour and Company; Swift and Company; Wilson & Co., Inc.; Chicago Sub-committee of the Joint Marketing Improvement Committee, Sheep Section; John Holmes; Charles R. Hood; William F. Monia; Walter A. Netsch; Paul C. Smith; L. Aubrey Williams; Thomas E. Wilson.

Defendant American Meat Institute, sometimes hereinafter referred to as the "Institute," is an Illinois corporation with principal offices in Chicago, Illinois. Said defendant was formerly known as the Institute of American Meat Packers and as the American Meat Packers Association. Its regular membership consists for the most part of meat packers, including the defendant meat packers.

Defendant Armour & Company, an Illinois corporation, is a meat packer with principal offices in Chicago, Illinois.

Defendant Swift and Company, an Illinois corporation, is a meat packer with principal offices in Chicago, Illinois.

Defendant Wilson & Co., Inc., a Delaware corporation, is a meat packer with principal offices in Chicago, Illinois.

The defendants Armour and Company, Swift and Company, and Wilson & Co., Inc., are sometimes referred to in this indictment as the defendant meat packers.

5. Defendant Chicago Sub-Committee of the Joint Marketing Improvement Committee, Sheep Section, sometimes hereinafter referred to as the "Sheep Section," is a voluntary, unincorporated association of individual representatives of meat packers and commission firms that buy and sell live sheep in the Chicago livestock market. It has continuously existed during the period of time covered by this indictment. Said defendant Sheep Section is affiliated with the Chicago Sub-Committee of the Joint Marketing Improvement Committee and with the Joint Marketing Improvement Committee. Its official headquarters are at the offices of the defendant Institute in Chicago, Illinois.

Defendant John Holmes is a resident of Chicago, Illinois, and is President of the defendant Swift and Company.

Defendant Charles R. Hood is a resident of Sandwich, Illinois, and is a Vice-President of the defendant Wilson & Co., Inc.

Defendant William F. Monia is a resident of Chicago, Illinois, and is a sheep buyer employed by the defendant Armour and Company.

Defendant Walter A. Netsch is a resident of Chicago, Illinois, an employee of the defendant Armour and Company, and Chairman of the defendant Sheep Section.

Defendant Paul C. Smith is a resident of River Forest, Illinois, and is a Vice-President of the defendant Swift and Company.

Defendant L. Aubrey Williams is a resident of Chicago, Illinois, an employee of John Clay & Company (a commission firm selling live sheep in the Chicago livestock market), and an order buyer of sheep in the employ of C. A. Kleman (a partnership engaged in order buying of sheep in the Chicago livestock market).

Defendant Thomas E. Wilson is a resident of Chicago, Illinois, and is Chairman of the Board of Directors of the defendant Wilson & Co., Inc.

6

CO-CONSPIRATORS

The following natural persons are not indicated but are named as co-conspirators herein:

Edward J. Dauphinais, a resident of Chicago, Illinois, and a sheep buyer employed by the defendant Armour and Company.

Roy F. Guy, a resident of Chicago, Illinois, and a sheep buyer employed by the defendant Swift and Company.

Garland Russell, a resident of La Grange, Illinois, who is employed by the defendant Swift and Company as supervisor of sheep buyers and is a member of the defendant Sheep Section.

Henry G. Coldsnow, a resident of Chicago, Illinois, and a sheep buyer employed by the defendant Swift and Company.

George E. Meyers, a resident of Chicago, Illinois, and a sheep buyer employed by the defendant Wilson & Co., Inc.

Leo J. Farrell, a resident of Chicago, Illinois, and a sheep buyer employed by the defendant Wilson & Co., Inc.

Homer R. Davidson, a resident of Valparaiso, Indiana, Vice-President of the defendant Institute, and Co-Secretary of the defendant Sheep Section.

John H. Swanson, a resident of Chicago, Illinois, a sheep salesman employed by John Clay & Company (a commission firm selling live sheep in the Chicago livestock market), and a member of the defendant Sheep Section.

Ernest A. Beilfus, a resident of Chicago, Illinois, a sheep salesman employed by Chicago Producers Commission Company (a commission firm selling live sheep in the Chicago livestock market), and a member of the defendant Sheep Section.

J. Clark Eastes, a resident of Chicago, Illinois, a partner in W. R. Smith & Son (a commission firm selling live sheep in the Chicago livestock market), and a member of the defendant Sheep Section.

7 Alexander L. Enright, a resident of Chicago, Illinois, a sheep salesman employed by National Livestock Commission Company (a commission firm selling live sheep in the Chicago livestock market), and a member of the defendant Sheep Section.

Thomas Lynch, a resident of Chicago, Illinois, a sheep salesman employed by Farmers Union Livestock Commission Company (a commission firm selling live sheep in the Chicago livestock market), and a member of the defendant Sheep Section.

James Lee Morrion, a resident of Chicago, Illinois, a partner in Morrion & Wilkins (a commission firm selling live sheep in the Chicago livestock market), and a member of the defendant Sheep Section.

Frank H. Connor, Alan F. Wilson, Charles G. Smith, and Maxwell B. Morgan, co-partners doing business under the firm name of C. A. Kleman (a commission firm buying live sheep in the Chicago livestock market).

NATURE OF THE TRADE AND COMMERCE INVOLVED

In the City of Chicago, Illinois, there is located a public stockyard which has facilities for handling and marketing live sheep. Large quantities of sheep produced in Kentucky, Iowa, Minnesota, North Dakota, South Dakota, Montana, Colorado, Texas, and other states are shipped daily by producers to this stockyard for sale in the Chicago livestock market, which is conducted at the stockyard.

Doing business in the Chicago livestock market are commission firms. These commission firms receive the sheep so shipped and display them for sale in regularly assigned pens. The commission firms as agents for the producers sell the sheep on commission. This commission is based upon the number of sheep sold and bears no relation to the sale price.

8 The defendants Armour and Company, Swift and Company, and Wilson & Co., Inc., have slaughtering plants located adjacent to the public stockyard in Chicago. These defendants employ sheep buyers, who deal in the market with sheep salesmen, representing commission firms, for the purchase and sale of the live sheep displayed in the pens. The defendant L. Aubrey Williams is an order buyer. He purchases live sheep in accordance with orders received by him from meat packers who have slaughtering plants located in states other than Illinois. An important factor in determining the price to be paid for the live sheep is the buyer's estimate of the amount of dressed meat that the sheep will yield. Over 90 per cent of the live sheep received at the stockyard are purchased by the defendants Swift and Company, Wilson

& Co., Inc., Armour and Company, and Williams. The defendant Williams is also a sheep salesman representing commission firms.

Live sheep are customarily bid and sold in the Chicago livestock market on the day of receipt. The market is open from Monday to Saturday, inclusive. Most sheep arriving on Saturday, however, are not bid and sold in trading on that day but are purchased prior to arrival under a practice of buying to arrive on Saturday at market prices prevailing on the day of sale.

Live sheep sold in the Chicago livestock market are in part transshipped to destination points in Illinois and other states and in part slaughtered and processed in Illinois and sold as dressed meat in Illinois and other states.

THE CONSPIRACY

During a period of approximately four years immediately preceding the return of this indictment, the defendants, together with their co-conspirators named herein and other persons unknown to the Grand Jurors, have engaged knowingly and continuously in a conspiracy to fix prices for the sale, in the Chicago livestock market in Illinois, of live sheep shipped from states other than Illinois to the said market for sale therein, which conspiracy has been, within the three years next preceding the return of this indictment, in restraint of the interstate trade and commerce described in this indictment and in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act To protect trade and commerce against unlawful restraints and monopolies" (U. S. C., Title 15, Section 1), commonly known as the Sherman Act.

It has been a part of the aforesaid conspiracy that the defendants suppress competitive trading in live sheep in the Chicago livestock market; that the defendant meat packers agree upon the respective shares of the receipts of live sheep at the said market to be purchased by them and govern their purchases accordingly; and that the defendants and their co-conspirators agree upon and follow rules controlling the order in which sheep buyers respectively deal with each sheep salesman, the time-length of such negotiations, and the prices and other terms and conditions of bids and sales.

For the purpose of effectuating the aforesaid conspiracy, the defendants have done those things which, as hereinbefore alleged, they have conspired to do and more particularly have done, among others, the following acts and things:

The defendants and their co-conspirators have frequently and regularly held meetings at which they have discussed and adopted

rules sanctioning the purchase of live sheep "to arrive on Saturday," prescribing the tossing of coins by sheep buyers to determine the order in which each buyer shall deal with each sheep salesman, governing the time-length of such negotiations, and governing the prices and other terms and conditions of bids and sales made in the aforesaid regulated order of precedence

- 10 among sheep buyers and within the aforesaid regulated time limits.

The defendants and their co-conspirators have regularly engaged in the practices sanctioned or prescribed by the aforesaid rules and refrained from practices prohibited by such rules, in the conduct of trade in live sheep in the Chicago livestock market.

The defendants and their co-conspirators have appointed Homer R. Davison as a referee to enforce compliance with the aforesaid rules, and such referee has enforced compliance.

The defendants and their co-conspirators have regularly exchanged among themselves dressing percentage results indicating the amount of dressed meat obtained by the defendant meat packers from live sheep purchased by them.

The defendant meat packers have regularly exchanged among themselves information revealing the quantity of live sheep purchased by each and, thereby, the current market position of each with relation to its respective agreed share of the receipts of live sheep at the Chicago livestock market.

The acts done, pursuant to and in furtherance of the conspiracy herein alleged, have had the effect, as intended by the defendants, of suppressing competition in the purchase and sale of live sheep in the Chicago livestock market, of arbitrarily depressing, stabilizing, and otherwise controlling and fixing noncompetitive prices for live sheep sold in the said market, and have had the effect, thereby, of restraining the interstate trade and commerce described in this indictment.

JURISDICTION AND VENUE

The conspiracy charged in this indictment has been formed and carried on, as hereinbefore alleged, by the defendants, together with their co-conspirators named herein and other persons unknown to the Grand Jurors, within the Eastern Division of the Northern District of Illinois during the three years next preceding the return of this indictment.

11 And so the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the defendants named, at the time and place and in the manner and form aforesaid, unlawfully have combined and conspired in restraint of the trade and commerce among

the several states of the United States described in this indictment, against the peace and dignity of the United States and contrary to the form of the statute of the United States in such case made and provided.

s/ DANIEL B. BRITT,
Daniel B. Britt,
*Special Assistant to the
Attorney General.*

s/ RICHARD B. O'DONNELL,
Richard B. O'Donnell,

s/ ROBERT DILLER,
Robert Diller,

s/ CHESTER D. JOHNSON,
Chester D. Johnson,

s/ JAMES M. MALLOY,
James M. Malloy,

s/ JAMES C. CRAMOND,
James C. Cramond,

s/ JAMES E. MANN,
James E. Mann,

Special Attorneys.

s/ THURMAN ARNOLD,
Thurman Arnold,
Assistant Attorney General.

s/ J. ALBERT WOLL,
J. Albert Woll,
United States Attorney.

12

INDICTMENT

Violation of Section One of the Act of July 2, 1890 (U. S. C. A. Title 15, Sec. 1).

A true bill, James G. Badger, foreman.

[File endorsement omitted.]

13

In United States District Court

Criminal Docket

[Title omitted.]

Docket Entries

1941 Grand Jury for May 1941 (Extended) returns the
June 19— above indictment in open court this date before
Judge Barnes. Summons to issue for corporate
defts and bench warrants for individual defendants
and bonds of individual defts set at \$1,000 each.
Barnes, J.

- 1942 Mo. of Def't L. A. Williams for lv. to file demurrer and
 Feb. 20— mo. to quash instant, for lv. to file special plea in
 bar instant and or ruling of the Court that demur-
 rer is not waived by filing special plea, allowed. Lv.
 to Govt. to submit answer brief by April 6, 1942, and
 Def't. Williams to have 10 days for reply (draft).
 Holly, J.
- Feb. 20— Filed Demurrer and Motion to Quash and Special Plea
 in Bar—L. Aubrey Williams by Thomas A. Rey-
 nolds and Walter H. Jacobs his attys.
- Feb. 28— Filed Special Plea in Bar of Def't. William F. Monia
 by C. F. Faulkner, Jr., Weymouth Kirkland, John
 P. Barnes, R. F. Feagans, and A. L. Hodson, Attys.
- Mar. 18— Filed Demurrer to Special Plea In Bar of L. Aubrey
 Williams and William F. Monia—Daniel B. Britt,
 Special Ass't to Attorney General.
- June 3— Demurrer to pleas in bar of Def'ts. L. Aubrey Williams
 and William F. Monia overruled—indictment dis-
 missed as to said defendants, their bonds discharged,
 exceptions allowed (draft). Holly, J.

14 In the District Court of the United States, Northern
 District of Illinois

[Title omitted.]

Special plea in bar

Filed Feb. 20, 1942

And now comes L. Aubrey Williams, one of the defendants
 herein, and for a special plea herein says:

First: That the Indictment herein was returned and presented
 by a Grand Jury duly impaneled, sworn, and charged in this
 Honorable Court at the May 1941 Term of said Court to investi-
 gate, among other matters, the matters charged in the Indictment
 herein.

Second: That on or about May 5, 1941, the United States Mar-
 shal, William H. McDonnell, duly served a subpoena upon this
 defendant, requiring him under penalty to appear before said
 Grand Jury so investigating the matters covered by the Indict-
 ment herein as a witness on behalf of the United States, said
 subpoena being in words and figures as follows:

15 "United States District Court, Northern District of Illi-
 nois. No. 8042. United States vs. * * * Grand Jury
 * * * L. A. Williams. To Home Address: 8029 Rhodes Avenue,
 Chicago. Business Address: C. A. Kleman Company, Union Stock
 Yards, Chicago, Illinois. You are required, under penalty, to

appear as a witness on behalf of the United States in the above-mentioned Court, at Room 450, United States Court House, Chicago, Ill., on May 6, 1941, at 10 o'clock a. m. In order to get fees for your attendance and mileage, report each morning at Room 450, United States Attorney's office, and show this card, which must be preserved until you are discharged by him. Wm. H. McDonnell, United States Marshal."

On the reverse side:

"Department of Justice, Office of United States Attorney, 450 United States Court House, Chicago, Illinois. To the Clerk of the United States District Court: It is hereby certified that the person whose name appears on the other side of this ticket has attended the United States District Court, as indicated below, as a witness on behalf of the United States, and should be allowed the legal fees and mileage upon taking the usual oath as to the number of days in attendance and miles traveled. * * * U. S. Attorney. Number of days, at \$1.50, \$———. Number of miles, at \$0.05, \$———. Total, \$———. 1940-1941-1942 Jan., Feb., Mar., Apr., May, June, July, Aug., Sept., Oct., Nov., Dec. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31."

Third: That in obedience to said subpoena, and not voluntarily, this defendant was, on the 15th and 16th days of May, 1941, duly called by said Grand Jury so investigating the matters covered by the Indictment herein as a witness for and on behalf of the United States.

Fourth: That this defendant was then and there duly sworn by the foreman of said Grand Jury, and thereupon, in response to questions propounded to him by Government counsel and the members of said Grand Jury, he was compelled to and did give testimony under oath during a period of about four hours on the afternoons of May 15, 1941, and May 16, 1941, concerning in a substantial way the transactions, matters, and things covered by the Indictment herein, and in particular this defendant was compelled to then and there give testimony in respect of the following matters and transactions:

"1. This defendant was questioned concerning, and gave answers in respect of, the intimate details of numerous business transactions between this defendant, as Buying Agent, and The Cudahy Packing Co., as his Principal, said transactions having involved the purchase by this defendant of live sheep in the Chicago live stock market within three years next preceding the return of the Indictment herein.

"2. This defendant was questioned at length and gave answers as to the details and extent of this defendant's participation in the exchange among the several defendants named in the Indictment of dressing percentage results—the exchange of such results being pleaded as an overt act of said Indictment.

"3. This defendant testified in a substantial way to many other transactions and matters prejudicial to this defendant, all of which transactions and matters are covered by the Indictment herein, as will appear from the minutes of said Grand Jury hearings."

Fifth: That this defendant is not learned in the law and did not consult an attorney-at-law prior to the taking of said testimony; that at no time was this defendant advised or warned by Government Counsel or by any member of said Grand Jury

or by any one else of his Constitutional Right to refuse to
17 testify in response to said questions then and there before said Grand Jury propounded to him and that at no time was this defendant required by Government Counsel or by anyone else, to, or did he orally or in writing, waive the immunity granted to him in the premises by the provisions of the statute in relation to immunity of witnesses. U. S. C. A., Title 15, Par. 32, Par. 33 (Feb. 25, 1903), C. 755, Par. 1, 32 Stat. 904) (June 30, 1906, C. 3920, 34 Stat. 798).

Wherefore, this defendant pleads specially said facts in bar of further prosecution of said Indictment against him, and prays that he be discharged and go hence without day.

s/ L. AUBREY WILLIAMS,

Defendant.

[Duly sworn to by L. Aubrey Williams jurat omitted in printing.]

[SEAL]

s/ THOMAS A. REYNOLDS,

s/ WALTER H. JACORS,

Attorneys for said Defendant.

s/ WINSTON STRAWN & SHAW,

Of Counsel.

18 In District Court of the United States, Northern
District of Illinois

[Title omitted.]

Special Plea in Bar of Defendant William F. Monia

Filed Feb. 28, 1942

Now comes William F. Monia, one of the defendants to the above numbered indictment, by his attorneys, and presents this his spe-

cial plea in bar to said indictment No. 32776, returned herein on the 19th day of June 1941, and says that the United States of America ought not to prosecute further the aforesaid indictment against this defendant, and prays the court to dismiss said indictment as to this defendant, and to discharge this defendant, for the reason that this defendant has received immunity from prosecution and from being subjected to any penalty or forfeiture for or on account of the transaction, matters, and things charged against him in said indictment, pursuant to the Constitution and laws of the United States, including the provisions of Section 32 of Title 15 of the United States Code, all as hereinafter more fully set forth in this special plea in bar:

1. In said indictment No. 32776, Armour and Company, a corporation, and William F. Monia among others, are indicted, made defendants and identified as follows:

19 "Defendant William F. Monia is a resident of Chicago, Illinois, and is a sheep buyer employed by the defendant Armour and Company";

"Defendant Armour and Company, an Illinois corporation, is a meat packer with principal offices in Chicago, Illinois."

2. The Fifth Amendment to the Constitution of the United States reads in part as follows:

"No person shall . . . be compelled in any Criminal Case to be a witness against himself, . . ."

3. For the purposes of compelling the testimony of witnesses and the production of evidence in any proceeding, suit, or prosecution under the Anti-Trust Laws of the United States, Congress has enacted Section 32 of Title 15 of the United States Code, which provides:

"§ 32. *Immunity of witness.*—No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1 to 27, inclusive, of this chapter: *Provided*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

4. On or about May 27, 1941, this defendant was served with a subpoena requiring him to appear before said grand jury for the May Term 1941 and testify in behalf of the United States. In pursuance of said subpoena, this defendant appeared before said grand jury for the May Term 1941 and complied with said subpoena, and defendant testified orally on May 27, 1941, as hereinafter more fully set forth. Said grand jury for the May Term 1941 was then and there conducting an investigation concerning trans-

actions, matters, and things claimed to be in violation of the Anti-Trust Laws of the United States including the matters charged in said indictment. Said subpoena was issued and served upon this defendant, an employee of said Armour and Company, in connection with and in aid of said investigation.

20 5. Pursuant to and in response to said subpoena and solely by reason of the compulsion and threat thereof, and not voluntarily, this defendant, on to wit: May 27, 1941, presented himself at the place designated in said subpoena and there on said date, after being sworn, proceeded to testify at length as a witness on behalf of the United States before said grand jury for the May Term 1941, and answered each and every question put to him by or before said grand jury.

6. In obedience to the command of said subpoena as aforesaid, this defendant was compelled to and did give testimony on oath before said grand jury concerning in a substantial way the transactions, matters, and things covered by the indictment herein and in particular, this defendant, in response to questions put to him before said grand jury, gave testimony in respect to the following matters and transactions:

"(a) His position as head sheep buyer in Chicago, Illinois, for defendant Armour and Company; his duties as agent for said Armour and Company in the buying of sheep at Chicago, Illinois; his assistant sheep buyers and their duties, and the acts performed by him and them in accordance with such duties;

"(b) The manner in which the prices bid daily by defendant and his assistants for sheep purchased on the Chicago livestock market for said defendant Armour and Company are determined; his participation in such determination and his instructions to his assistants with respect thereto;

"(c) The practice of tossing coins; the privileges accorded as a result thereof and his and his assistants' participation therein."

This defendant stands ready to and offers to produce a copy of the transcript of his said testimony given before said grand jury as aforesaid.

7. And this defendant avers and submits that under and by virtue of the Constitution and laws of the United States and because of the premises aforesaid, he cannot be prosecuted or subjected to any penalty or forfeiture for or on account of the transactions, matters, and things, or any or either of them, which are in this indictment mentioned and charged against
21 this defendant.

Wherefore, defendant William F. Monia prays judgment that this said indictment against him be dismissed and set aside as to him and that he be discharged and go hence without day.

By s/ WILLIAM F. MONIA,
CHARLES J. FAULKNER, JR.,
Charles J. Faulkner, Jr.,
s/ WEYMOUTH KIRKLAND,
Weymouth Kirkland,
s/ JOHN P. BARNES,
John P. Barnes,
s/ R. F. FEAGANS,
R. F. Feagans,
s/ A. L. HODSON,
A. L. Hodson,

His Attorneys.

[Duly sworn to by William F. Monia; jurat omitted in printing.]

22 In District Court of the United States for the
Northern District of Illinois

[Title omitted.]

Demurrer to special plea in bar of L. Aubrey Williams, Defendant

Filed March 18, 1942

Comes now the United States of America by Daniel B. Britt, Special Assistant to the Attorney General, and demurs to the special plea in bar heretofore interposed to Indictment No. 32776 by the defendant L. Aubrey Williams, on the grounds:

First: That said plea does not state facts sufficient to constitute a special plea in bar to the above indictment.

Second: That said plea does not state facts sufficient to entitle the defendant L. Aubrey Williams to immunity from prosecution or from subjection to penalty or forfeiture.

Third: That said plea does not allege that the defendant L. Aubrey Williams claimed the privilege against self-incrimination afforded by the fifth amendment to the Constitution of the United States, and consequently neither the fifth amendment to the Constitution of the United States nor section 32 of Title 15, U. S. C. A., commonly known as the immunity statute, has any application.

23 Fourth: That said plea is not well taken as a matter of law.

Dated March 8, 1942.

s/ DANIEL B. BRITT,
Daniel B. Britt,

Special Assistant to the Attorney General.

24 In District Court of the United States for the
Northern District of Illinois

[Title omitted.]

Demurrer to special plea in bar of William F. Monia, Defendant

Filed March 18, 1942

Comes now the United States of America by Daniel B. Britt, Special Assistant to the Attorney General, and demurs to the special plea in bar heretofore interposed to Indictment No. 32776 by the defendant William F. Monia, on the grounds:

First: That said plea does not state facts sufficient to constitute a special plea in bar to the above indictment.

Second: That said plea does not state facts sufficient to entitle the defendant William F. Monia to immunity from prosecution or from subjection to penalty or forfeiture.

Third: That said plea does not allege that the defendant William F. Monia claimed the privilege against self-incrimination afforded by the fifth amendment to the Constitution of the United States, and consequently neither the fifth amendment to the Constitution of the United States nor section 32 of Title 15, U. S. C. A., commonly known as the immunity statute, has any application.

25 Fourth: That said plea is not well taken as a matter of law.

Dated March 18, 1942.

s/ DANIEL B. BRITT,
Daniel B. Britt,

Special Assistant to the Attorney General.

26 In District Court of the United States for the
Northern District of Illinois, Eastern Division

Indictment No. 32776

UNITED STATES OF AMERICA

v.

AMERICAN MEAT INSTITUTE ET AL.

*Order and Judgment on Demurrers of the United States of
America to the Special Pleas in Bar of the Defendants L.
Aubrey Williams and William F. Monia*

June 5, 1942

This cause having come on to be heard upon the demurrers of the United States of America to the special pleas in bar entered

by the defendants L. Aubrey Williams and William F. Monia to the indictment herein, and the Court having read and considered the same and having read and considered the briefs filed by the United States of America in support of its demurrers and by the said defendants in opposition thereto, and having rendered and filed herein its Opinion on said cause, and being then and now fully advised in the premises;

It is hereby ordered and adjudged:

First, that the demurrers of the United States of America to the special pleas in bar of L. Aubrey Williams and William F. Monia, are hereby overruled for the reasons set out in the Opinion rendered by the Court;

Second, that the indictment is hereby dismissed as to the defendants L. Aubrey Williams and William F. Monia, and the bail bond of each of said defendants is hereby discharged; and

Third, that the United States of America is hereby allowed exceptions to this order and judgment in so far as it may be aggrieved thereby.

Enter:

s/ HOLLY,

United States District Judge.

Dated: June 3, 1942.

26-A In United States District Court for the Northern District of Illinois, Eastern Division

No. 32776

UNITED STATES OF AMERICA

v.

AMERICAN MEAT INSTITUTE ET AL

Memorandum Opinion

June 3, 1942

Defendants were indicted charged with conspiracy to violate the Sherman Anti-Trust Act. Defendants, William and Monia, each filed his plea in bar setting up that in response to a subpoena he had appeared before the grand jury which had returned this indictment and given sworn testimony substantially concerning the matters on account of which he was named as defendant, and asserting that under the provisions of Sections 32 and 33 of Title 15 of the United States Code (U. S. C. Title 15 Secs. 32 and 33) he was immune from this prosecution. The Government has demurred to the pleas.

The statute on which the defendants reply reads as follows:

26-B "Immunity of witness.—No person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1 to 21, inclusive, of this chapter: Provided, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying (Feb. 25, 1903, c. 755 § 1, 32 Stat. 904, 15 U. S. C. A. 33).

"Immunity extended to natural persons only.—Under the immunity provisions in section 32 of this title immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath (June 30, 1906, c. 3920, 34 Stat. 798, 16 U. S. C. 33)."

Following the plain words of the statute it would seem clear that neither of these defendants can be prosecuted on account of the matters and things concerning which he testified before the grand jury. But the government says it is not bound by the words of the Act, we must read something else into it; what Congress intended was that only those persons are entitled to the benefit of the statute who, before testifying, declare to the court that they refused to testify on the grounds of self-incrimination and are thereafter required to testify.

It is a novel proposition that a criminal statute may be modified by reading into it something that would make conduct 26-C criminal, which, giving to the words of the statute their plain meaning, was not criminal, or which would take away from one charged with crime a privilege granted in plain and unambiguous words.

Counsel would have us read this statute in the light of the Constitutional provision against self-incrimination and the decisions of the court construing that provision. To so construe such a statute would be to lay a trap for the unwary. One called to testify before a grand jury is entitled to reply on the words of the Act, which are quite plain, and not upon some ingenious construction worked out by learned counsel from the Constitution and prior decisions of the court.

In *United States v. Wiltberger*, 5 Wheat. 76, the defendant had been indicted for manslaughter, the offense having been committed on board an American vessel in the river Tigris, in the empire of China, about 100 yards from the shore and below the low water mark, thirty-five miles above the mouth of the river. The section of the statute upon which the prosecution was based provided for

prosecution of one who committed manslaughter upon the high seas. Evidently the homicide was not committed upon the high seas but the Government contended for a construction of the whole act which would engraft the words of the 8th section, descriptive of the place in which murder might be committed, on the 12th section, which described the place where manslaughter might be committed. This transfer of the words of one section to the other, it was contended would express the obvious intent of the legislature. Passing upon this contention the court said, p. 95:

"The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of the words, especially in a penal act in search of an intention which the words did not themselves suggest."

Judge Hutcheson, sitting in the District Court, in a well reasoned opinion, *United States v. Pardue et al.*, 294 Fed. 543, held that a plea which set out facts substantially the same as those in the present case presented a bar to prosecution on account of matters testified to before the grand jury. To the same effect are *U. S. v. Golman*, 28 F. (2d) 424; *U. S. v. Ward*, 295 Fed. 576; *U. S. v. Moore*, 15 F. (2d) 593. I am aware that there are decisions to the contrary¹ but I cannot agree with them.

The demurrer to the pleas will be overruled. An order accordingly will be entered June 5, 1942.

(s) HOLLY, Judge.

27 In District Court of the United States Northern
District of Illinois

[Title omitted.]

Order allowing appeal to the Supreme Court of the United States

Filed July 3, 1942

This cause having come on this day before the Court on petition of the United States of America, praying for the allowance of an appeal to the Supreme Court of the United States for a reversal of the order and judgment herein overruling the Government's demurrers to the special pleas in bar filed by the defendants Wil-

¹ *U. S. v. Skinner*, 218 Fed. 870 is the leading case contra. Many of the cases cited by counsel for the Government did not involve the statute here under consideration.

liam F. Monia and L. Aubrey Williams to the indictment in this cause, and requesting that a duly authenticated copy of the record of this cause be transmitted to the Clerk of the Supreme Court of the United States; the Court having heard and considered said motion, together with petitioner's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause, the same having been duly filed with the Clerk of this Court,

It is therefore ordered and adjudged: That the United States of America be and it is hereby allowed an appeal to the Supreme Court of the United States from the order and judgment of this Court overruling the Government's demurrers to the special pleas in bar of the aforesaid defendants to the indictment herein, that a duly authenticated copy of the record in this cause be transmitted to the Clerk of the Court, and that a citation be issued as provided by law.

28 It is further ordered, That the United States of America be and it is hereby allowed a period of forty days from the date hereof within which to file and docket said appeal in the Supreme Court of the United States.

Dated at Chicago, Illinois, this 8rd day of July, 1942.

s/ HOLLY,
United States District Judge.

29 In District Court of the United States, Northern
District of Illinois

[Title omitted.]

Petition for appeal.

Filed July 3, 1942

The United States of America, plaintiff herein, states that on the 5th day of June, 1942, the Government demurrers to the special pleas in bar filed by the defendants William F. Monia and L. Aubrey Williams to the indictment in this cause were overruled by this Court. The plaintiff, feeling aggrieved by the rulings of the Court in overruling said demurrers and thereby sustaining the special pleas in bar of said defendants, prays that it be allowed to appeal to the Supreme Court of the United States for a reversal of said order and judgment, in so far as it overrules the Government's demurrers to the special pleas in bar to the indictment, and that a transcript of the record in this cause, duly authenticated, be sent to the Supreme Court of the United States.

The petitioner presents to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause.

s/ DANIEL B. BRITT,
Daniel B. Britt,

Special Assistant to the Attorney General.

s/ J. ALBERT WOLL,
J. Albert Woll,

*United States Attorney,
Northern District of Illinois, Eastern Division.*

30 In District Court of the United States, Northern
District of Illinois

[Title omitted.]

Assignments of error

Filed July 3, 1942

The United States of America, having filed its petition for appeal herein, now states that as a result of the action taken by this Court in overruling the demurrers filed by the Government to the special pleas in bar interposed by the defendants William F. Monia and L. Aubrey Williams to the indictment in this cause there has intervened manifest error to the prejudice of the United States in the following respects:

1. The Court committed material error against the plaintiff in overruling the demurrers interposed by the United States to the special pleas in bar entered by the defendants Monia and Williams to the indictment in the above-entitled cause.

2. The Court committed material error against the plaintiff in sustaining the special pleas in bar entered by the defendants Monia and Williams and dismissing the indictment as to said defendants.

3. The Court committed material error in holding that a natural person appearing in response to subpoena and giving testimony under oath before a grand jury investigating violations

31 of the Sherman Antitrust Act thereby secures automatic statutory immunity from prosecution on account of any transaction, matter, or thing concerning which he testifies, without the need for invoking the constitutional privilege against self-incrimination provided by the Fifth Amendment, or otherwise indicating that his testimony is being given in consideration of securing statutory immunity from prosecution.

The United States of America therefore respectfully prays that the action taken by this Court in overruling the demurrers of the Government and thereby sustaining the special pleas in bar entered by the defendants Monia and Williams, and the ruling of the Court entering judgment in favor of the said defendants on said demurrers be set aside and held for naught.

Filed: July 3, 1942.

DANIEL B. BRITT,

Special Assistant to the Attorney General.

32 [Citation in usual form, filed July 3, 1942, omitted in printing.]

33 In District Court of the United States, Northern District of Illinois

[Title omitted.]

Proof of service

Filed July 6, 1942

Service of the petition for appeal, order allowing appeal, assignments of error, statement of jurisdiction with opinion attached, praecipe, and citation in the above-entitled cause, together with a statement directing attention to the provisions of paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, is accepted and copies received this 6th day of July 1942.

s/ THOS. A. REYNOLDS,
Thos. A. Reynolds,

s/ WALTER H. JACOBS,
Walter H. Jacobs,

Attorneys for Defendant L. Aubrey Williams.

s/ CHARLES J. FAULKNER, JR.
Charles J. Faulkner, Jr.,

s/ WEYMOUTH KIRKLAND,
Weymouth Kirkland,

s/ JOHN P. BARNES,
John P. Barnes,

s/ R. F. FEAGANS,
R. F. Feagans,

s/ A. L. HODSON,
A. L. Hodson,

Attorneys for Defendant William F. Monia

34

In District Court of the United States,
Northern District of Illinois

[Title omitted.]

Præcipe for Transcript of Record

Filed July 3, 1942

To the Clerk, United States District Court,
Northern District of Illinois, Eastern Division:

The appellant hereby directs that, in preparing the transcript of the record in the above-entitled cause for its appeal to the Supreme Court of the United States, you include the following:

1. Docket entries showing the return of the indictment, filing of special pleas in bar of the defendants William F. Monia and L. Aubrey Williams, filing of demurrers by the United States of America to such special pleas in bar, and entry of order and judgment overruling said demurrers of the United States.

2. Indictment.

3. Special pleas in bar of the defendants William F. Monia and L. Aubrey Williams.

4. Demurrers of the United States of America to the aforesaid special pleas in bar.

5. Order and judgment overruling demurrers of the United States of America to the aforesaid special pleas in bar.

6. Opinion (Memorandum) accompanying the aforesaid order and judgment.

7. Petition for appeal to the Supreme Court of the United States.

8. Statement of jurisdiction of the Supreme Court of the United States.

35 9. Assignments of error.

10. Order allowing appeal.

11. Statement directing attention to the provisions of Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States.

12. Proof of service on appellees of petition for appeal, order allowing appeal, assignment of error, statement of jurisdiction with opinion attached, præcipe, citation, and statement directing attention to the provisions of Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States.

13. Citation.

14. Præcipe.

DANIEL B. BRITT,

Daniel B. Britt,

Special Assistant to the Attorney General.

36 [Clerk's certificate to foregoing transcript omitted in printing.]

38 In Supreme Court of the United States

Statement of points and designation of record to be printed

Filed Aug. 1, 1942

I.

United States of America, appellant, states that in its brief and oral argument on its appeal in the above-entitled cause it will rely upon the points stated in its assignment of errors therein.

II

The entire record in this cause as filed in this Court is necessary for consideration of the points stated by appellant, and the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court.

OSCAR COX,
Acting Solicitor General.

39 Service of the Statement of Points and Designation of
Record to be printed acknowledged this 27th day of July,
1942.

THOS. A. REYNOLDS,
Thos. A. Reynolds,
L. W.
WALTER H. JACOBS,
Walter H. Jacobs,
L. W.

Attorneys for Defendant L. Aubrey Williams.

CHAR. J. FAULKNER, Jr.
Charles J Faulkner, Jr.
WEYMOUTH KIRKLAND,
Weymouth Kirkland,
JOHN P. BARNES,
John P. Barnes,
by C. J. F.
R. F. FEAGONS,
R. F. Feagons,
by C. J. F.
A. L. HODSON,
A. L. Hodson.

Attorneys for Defendant William F. Monia.

42 [File endorsement omitted.]

43 Supreme Court of the United States

Order noting probable jurisdiction

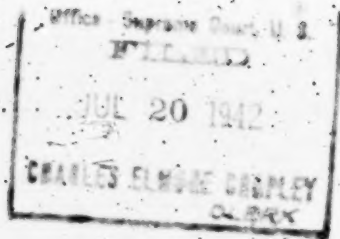
October 12, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

[Enter Attorney General.]

[Endorsement on cover:] File No. 46742. Northern Illinois, D. C. U. S. Term No. 248. The United States of America, appellant vs. William F. Monia and L. Aubrey Williams. Filed July 20, 1942. Term No. 248 O. T. 1942.

FILE COPY



No. 248

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM F. MONIA AND L. AUBREY WILLIAMS

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT AS TO JURISDICTION

**In the District Court of the United States,
Northern District of Illinois, Eastern
Division**

No. 32776 (Cr.)

UNITED STATES OF AMERICA

v.

AMERICAN MEAT INSTITUTE ET AL.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended; the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered on June 5, 1942, upon demurrers interposed by the Government to special pleas in bar entered by defendants William F. Monia and L. Aubrey Williams to the indictment in this cause. A petition for appeal was filed on *July 3, 1942*, and is presented to the District Court herewith, to wit, on the *3rd* day of *July, 1942*.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 Stat.

1246, as amended (18 U. S. C. § 682), commonly known as the Criminal Appeals Act, and by 28 U. S. C. § 345.

The following decisions sustain the direct appellate jurisdiction of the Supreme Court to review the judgment in this cause on the ground that the judgment is one sustaining a special plea in bar to the indictment, the defendants entering the plea not having been put in jeopardy. See *United States v. Murdock*, 284 U. S. 141; *United States v. Thompson*, 251 U. S. 407; *United States v. Oppenheimer*, 242 U. S. 85; *United States v. Barber*, 219 U. S. 72.

STATUTES INVOLVED

The statutes involved are the Act of February 25, 1903, c. 755, par. 1, 32 Stat. 904, 15 U. S. C. 32, and the Act of June 30, 1906, c. 3920, 34 Stat. 798, 15 U. S. C. 33, commonly known as the Immunity Statutes, the pertinent provisions of which are:

* * * no person shall be prosecuted or be subjected to any ~~penalty~~ or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts [the Interstate Commerce Commission Act, the Sherman Antitrust Act, and other acts]: *Provided further*, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

That under the immunity provisions in the Act entitled [foregoing] • • • immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

THE ISSUES AND THE RULING BELOW

The indictment in this case was returned on January 19, 1941, by a grand jury duly impaneled, sworn, and charged in the District Court of the United States for the Eastern Division of the Northern District of Illinois. The indictment charges the defendants American Meat Institute, Armour and Company, Swift and Company, Wilson & Co., Inc., William F. Monia, L. Aubrey Williams, and others, with having violated Section 1 of the Sherman Act (Act of July 2, 1890, 26 Stat. 209 as amended (15 U. S. C. 1)) by engaging in a conspiracy to fix prices for the sale in the Chicago livestock market of live sheep shipped in interstate commerce for sale in such market.

The defendants William F. Monia and L. Aubrey Williams each filed special pleas in bar, setting up the foregoing Immunity Statute as a bar to their prosecution. The Government demurred to these special pleas. The facts involved in such special pleas are that Monia and Williams are natural persons who were subpoenaed to appear before the grand jury which subsequently indicted them in this case. Each was sworn and gave testimony

concerning transactions and matters on account of which he was thereafter named as a defendant. Neither defendant, during the course of such appearance before the grand jury, invoked the constitutional privilege against self-incrimination provided by the Fifth Amendment, or in any other way indicated the testimony was being given in consideration of securing statutory immunity from prosecution.

The issue raised by the Government's demurrer to the special pleas was whether a natural person appearing in response to subpoena and giving testimony under oath before a grand jury investigating violations of the Sherman Antitrust Act thereby secures automatic statutory immunity from prosecution on account of any transaction or matter concerning which he testifies, without the need for invoking the constitutional privilege against self-incrimination provided by the Fifth Amendment, or otherwise indicating that his testimony is being given in consideration of the protection against prosecution afforded by the Immunity Statute.

The District Court, in overruling the Government's demurrer, rejected the Government's contention that protection against prosecution provided by the Immunity Statute does not operate automatically on appearance of the witness under subpoena before the grand jury, but becomes operative as a bar to prosecution only when the witness asserts his constitutional privilege against

self-incrimination, or otherwise indicates that his testimony is being given in consideration of the protection against prosecution afforded by the Immunity Statute. The effect of the judgment of the District Court is to bar prosecution of the defendants Monia and Williams for the offense charged in the indictment.

THE QUESTION IS SUBSTANTIAL

The question involved in the judgment of the District Court is substantial and of public importance. There is no decision of the Supreme Court precisely in point, but in analogous cases such as *Heike v. United States*, 227 U. S. 131, and *Brown v. United States*, 276 U. S. 134, the Supreme Court has held that the Immunity Statute is to be construed in the light of its purpose of making evidence available and compulsory that otherwise could not be got, and that the statute is to be regarded as coterminous with the constitutional privilege against self-incrimination afforded by the Fifth Amendment.

The question presented has been passed upon by several lower federal courts, both under the statutes here involved and under similar statutes granting immunity from prosecution for other offenses. Although there is a division of opinion on the issue, the weight of authority appears to support the contention of the Government. In *United States v. Greater New York Live Poultry Chamber of Com-*

merce, 33 F. 2d 1005 (S. D. N. Y., 1929), a case arising under the Sherman Act, it was expressly held that a witness received no immunity from prosecution unless he claimed such immunity before testifying. Accord: *United States v. Lay Fish Co.*, 13 F. 2d 136 (S. D. N. Y., 1926) [involving immunity provisions of the Sherman Act]; *United States v. Skinner*, 218 Fed. 870 (S. D. N. Y., 1914) [involving same immunity provisions as applied to Interstate Commerce Act]; and *Johnson v. United States*, 5 F. 2d 471 (C. C. A. 4th, 1925) [involving the immunity provisions of the National Prohibition Act]. See also Wigmore, *Evidence* (3d ed.) § 2282. Contra: *United States v. Pardue*, 294 Fed. 543 (S. D. Texas, 1923) [involving immunity provisions of the Federal Trade Commission Act]; *United States v. Moore*, 15 F. 2d 593 (D. Ore., 1926), and *United States v. Goldman*, 28 F. 2d 424 (D. Conn., 1928) [involving immunity provisions of the National Prohibition Act].

Pending a final determination of the issue presented in this cause, further grand jury investigations of Sherman Act violations will be greatly embarrassed for the reason that Government prosecutors in charge of such investigations frequently cannot know prior to a witness's appearance before a grand jury whether his testimony may or may not be self-incriminating and whether the witness's testimony may or may not be so vital

as to justify the calling of the witness under subpoena and the giving of statutory immunity to him as a consideration for his testimony.

Respectfully submitted.

✓ CHARLES FAHY,
Solicitor General.

JULY 1942.

**In the United States District Court, for the
Northern District of Illinois, Eastern
Division**

No. 32776

**UNITED STATES OF AMERICA,
v.
AMERICAN MEAT INSTITUTE ET AL.**

MEMORANDUM

Defendants were indicted charged with conspiracy to violate the Sherman Anti-Trust Act. Defendants, Williams and Monia, each filed his plea in bar setting up that in response to a subpoena he had appeared before the grand jury which had returned this indictment and given sworn testimony substantially concerning the matters on account of which he was named as defendant, and asserting that under the provisions of Sections 32 and 33 of Title 15 of the United States Code (U. S. C. Title 15 Secs. 32 and 33) he was immune from this prosecution. The Government has demurred to the pleas.

The statute on which the defendants rely reads as follows:

Immunity of witness.—No person shall be prosecuted or subjected to any penalty or

forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under sections 1 to 27, inclusive, of this chapter: *Provided*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying (Feb. 25, 1903, c. 755 § 1, 32 Stat. 904, 15 U. S. C. A. 32).

Immunity extended to natural persons only.—Under the immunity provisions in section 32 of this title immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath (June 30, 1906, c. 3920, 34 Stat. 798, 16 U. S. C. 33).

Following the plain words of the statute it would seem clear that neither of these defendants can be prosecuted on account of the matters and things concerning which he testified before the grand jury. But the government says it is not bound by the words of the Act, we must read something else into it; what Congress intended was that only those persons are entitled to the benefit of the statute who, before testifying, declare to the court that they refused to testify on the grounds of self-incrimination and are thereafter required to testify.

It is a novel proposition that a criminal statute may be modified by reading into it something that would make conduct criminal, which, giving to the

words of the statute their plain meaning, was not criminal, or which would take away from one charged with crime a privilege granted in plain and unambiguous words.

Counsel would have us read this statute in the light of the Constitutional provision against self-incrimination and the decisions of the court construing that provision. To so construe such a statute would be to lay a trap for the unwary. One called to testify before a grand jury is entitled to rely on the words of the Act, which are quite plain, and not upon some ingenious construction worked out by learned counsel from the Constitution and prior decisions of the court.

In *United States v. Wiltberger*, 5 Wheat. 76, the defendant had been indicted for manslaughter, the offense having been committed on board an American vessel in the river Tigris, in the empire of China, about 100 yards from the shore and below the low water mark, thirty-five miles above the mouth of the river. The section of the statute upon which the prosecution was based provided for prosecution of one who committed manslaughter upon the high seas. Evidently the homicide was not committed upon the high seas but the Government contended for a construction of the whole act which would engraft the words of the 8th section, descriptive of the place in which murder might be committed, on the 12th section, which described the place where manslaughter might be committed. This transfer of the words of one

section to the other, it was contended would express the obvious intent of the legislature. Passing upon this contention the court said, p. 95:

The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of the words, especially in a penal act in search of an intention which the words did not themselves suggest.

Judge Hutcheson, sitting in the District Court, in a well reasoned opinion, *United States v. Pardue, et al.*, 294 Fed. 543, held that a plea which set out facts substantially the same as those in the present case presented a bar to prosecution on account of matters testified to before the grand jury. To the same effect are *U. S. v. Golman*, 28 F. (2d) 424; *U. S. v. Ward*, 295 Fed. 576; *U. S. v. Moore*, 15 F. (2d) -593. I am aware that there are decisions to the contrary¹ but I cannot agree with them.

The demurrer to the pleas will be overruled. An order accordingly will be entered June 5, 1942.

(s) HOLLY,

Judge.

¹ *U. S. v. Skinner*, 218 Fed. 870 is the leading case contra. Many of the cases cited by counsel for the Government did not involve the statute here under consideration.

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DEC 2 1942

CHARLES ELLIOTT SHIPLEY

No. 248

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM F. MONIA AND L. AUBREY WILLIAMS

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF ILLINOIS**

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 248

THE UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM F. MONIA AND L. AUBREY WILLIAMS

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF ILLINOIS**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 15-17)
has not been reported.

JURISDICTION

The judgment of the District Court was entered June 5, 1942 (R. 14-15). A petition for appeal was filed on July 3, 1942 (R. 18-19), and was allowed the same day (R. 17-18). Jurisdiction is conferred on this Court by the Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 401, 18 U. S. C. 682, known as the Criminal Appeals Act, and Section 238 of

the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. 345. Probable jurisdiction was noted on October 12, 1942 (R. 23).

QUESTION PRESENTED

The sole question involved is whether a person who appears in obedience to a subpoena before a grand jury investigating an alleged violation of the Sherman Act, and gives testimony under oath concerning in a substantial way the matter being investigated, obtains immunity from prosecution for that matter under the immunity provision of the Sherman Act, even though he does not claim his privilege against self-incrimination or in any way indicate an unwillingness to testify.

STATUTES INVOLVED

The Act of February 25, 1903, 32 Stat. 854, 904, 15 U. S. C. 32, provides in part that:

* * * no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts [the Interstate Commerce Act, the Sherman Antitrust Act, and others]: *Provided further*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

The Act of June 30, 1906, 34 Stat. 798, 15 U. S. C. 33, provides that:

* * * under the immunity provisions
 * * * [of the above Act and others] immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

SPECIFICATION OF ERROR

The District Court erred in holding that a natural person appearing in response to subpoena and giving testimony under oath before a grand jury investigating violations of the Sherman Antitrust Act thereby secures automatic statutory immunity from prosecution on account of any transaction, matter, or thing concerning which he testifies, without the need for invoking the constitutional privilege against self-incrimination provided by the Fifth Amendment, or otherwise indicating that his testimony is being given in consideration of securing statutory immunity from prosecution.

STATEMENT

This is a direct appeal by the United States from a judgment of the District Court for the Northern District of Illinois overruling the Government's demurrers to special pleas in bar filed by the appellees to an indictment charging them, and others, with a violation of Section 1 of the Sherman Act.

The indictment was returned on June 19, 1941. It charges American Meat Institute; Armour and Company; Swift and Company; Wilson & Co., Inc.; Chicago Subcommittee of the Joint Marketing Improvement Committee, Sheep Section; and a number of individuals, including the appellees, with a conspiracy to fix prices for the sale in the Chicago livestock market of live sheep shipped in interstate commerce to that market (R. 1-7). Appellee William F. Monia is described in the indictment as a sheep buyer employed by defendant Armour and Company (R. 2); appellee L. Aubrey Williams is described as an employee of a commission firm selling live sheep in the Chicago market, and an order buyer of sheep for a partnership engaged in order buying of sheep at the market (R. 3).

The appellee L. Aubrey Williams, on February 20, 1942, and the appellee William F. Monia, on February 28, 1942, filed special pleas in bar to the indictment (R. 8-10, 10-13). Each plea alleges that the appellee, in obedience to a subpoena duly served upon him, appeared as a witness on behalf of the United States before the grand jury investigating the matters charged in the indictment and gave testimony under oath concerning in a substantial way the transactions, matters, and things covered by the indictment. Each plea also alleges with some particularity the subject matter of the testimony given. It is unnecessary to set

out these particulars here, or to summarize the charges of the indictment, for no contention is made by the Government, either in its demurrers or in its argument below or here, that the testimony given did not concern in a substantial way the matters charged in the indictment.

The plea of appellee Williams also alleges that he is not learned in the law and did not consult counsel prior to testifying; he was not advised by Government counsel or any member of the grand jury or anyone else of his constitutional privilege; and he was not required by Government counsel or anyone else to waive, and he did not waive, the immunity provided by the immunity provision (R: 10). The plea of appellee Monia contains no such allegations.

On March 18, 1942, the Government filed demurrers identical in substance to both pleas (R. 13, 14). The main ground of the demurrers is that the pleas do not state facts sufficient to constitute special pleas in bar for the reason that they do not allege that the appellees made any claim of privilege against self-incrimination, and consequently neither the Fifth Amendment to the Constitution nor the immunity statute has any application.

The District Court on June 3, 1942, filed a memorandum opinion (R. 15-17), and on June 5, 1942, entered its order overruling the demurrers and dismissing the indictment as to both appellees

(R. 14-15). The court held that, under the plain words of the statute, the defendants could not be prosecuted, regardless of whether they had claimed the privilege, and that to construe the law otherwise would be "to lay a trap for the unwary." (R. 16.)

SUMMARY OF ARGUMENT

Under the Fifth Amendment to the Constitution, a person waives his privilege against self-incrimination unless he claims it on the witness stand. The object of the immunity statutes passed after this Court's decision in *Counselman v. Hitchcock*, 142 U. S. 547, was to provide a "full substitute" for the constitutional protection. But it was intended to grant immunity only for testimony which the Government would have been otherwise unable to obtain, not to offer "a gratuity to crime." *Heike v. United States*, 227 U. S. 131. In the light of the constitutional prohibition and the obvious purpose of the immunity acts, they should be construed as coextensive with the privilege against self-incrimination. Since the constitutional privilege is not effective unless claimed, the immunity is not granted by the statute where the witness does not claim it and is testifying voluntarily.

This position is supported by the unreasonable results which would follow if immunity were automatically granted under the statute without any claim of privilege. The Government often does

not know whether, or to what extent, a witness may have participated in a crime. If immunity is received without the privilege being claimed, the prosecutor runs the risk of unintentionally giving immunity; he is unable to determine in advance whether it is more desirable to obtain the testimony, thereby giving immunity, or to retain the right to prosecute the witness. The witness, however, has full knowledge as to his own conduct and as to whether he may be incriminated by his testimony. It is therefore fair to require him to claim his privilege and thus put the prosecutor on notice before he is compelled to testify and immunity is obtained.

Conflicting inferences may be drawn from the early legislative background of the immunity act. Of particular significance now is the requirement included in most immunity statutes since 1933 that the witness must claim his privilege before immunity is obtained. This addition, we believe, was not intended to change the substance of the law but to clarify the confusing situation presented by divided authorities. There is no reason to suppose that Congress would have intended a different and more restrictive immunity rule to apply to the enforcement of such important acts as the Interstate Commerce Act, the Sherman Act, or the Federal Trade Commission Act, as compared with the recent legislation, or to place greater restrictions upon the agency administer-

ing the Fair Labor Standards Act (which incorporates the procedural provisions of the Federal Trade Commission Act) than upon the National Labor Relations Board, the Bituminous Coal Commission, and most of the other agencies created during the same period.

ARGUMENT

The appellees appeared before the grand jury in obedience to subpoenas and gave testimony under oath which tended to incriminate them concerning the matters charged in the indictment returned by the grand jury. They at no time advised the Government that their answers would tend to incriminate them; they did not claim their privilege against self-incrimination; and they never disclosed or indicated an unwillingness to testify. Neither plea charges any bad faith or deception on the part of the Government or the members of the grand jury. There is nothing, apart from the issuance of the subpoena, which has frequently been held to be immaterial,¹ which in any way shows that the testimony was not voluntary.

¹ It is clear that the subpoena in itself is not sufficient to make the testimony compulsory for purposes of self-incrimination. A subpoena does not compel incriminating testimony; it merely compels appearance. For this reason, it has always been the rule that the privilege against self-incrimination is no defense to a subpoena, but can only be raised with respect to particular questions propounded. *O'Connell v. United States*, 40 F. (2d) 201, 205 (C. C. A. 2) certiorari granted 281 U. S. 716, dismissed per stipulation, 296 U. S. 667; *Thompson v. United States*, 10 F. (2d) 781, 783 (C. C.

On these facts the appellees contend, and the District Court held, that they secured immunity. This view rests on the proposition that the immunity statute provides immunity for anything concerning which a witness testifies, even though the testimony is not compelled but is given voluntarily. It is the position of the Government, on the other hand, that the immunity statute does not extend to testimony voluntarily given, but that it applies only when the witness claims his privilege or at least indicates an unwillingness to testify for fear of self-incrimination and the Government then compels the testimony.

I

THE HISTORY OF THE IMMUNITY CLAUSE

It has long been recognized that the privilege against self-incrimination, both at common law and under the Fifth Amendment, is waived if not claimed by the witness on the stand. *United States ex rel. Vajtauer v. Commissioner*, 273 U. S. 103, 113; *United States v. Murdock*, 284 U. S. 141, 148; *Powers v. United States*, 223 U. S. 303, 314; 8 *Wigmore, Evidence* (3d ed. 1940), § 2276. If it is claimed, however, in the absence of a proper immunity statute the witness could not be

A. 7), certiorari denied, 270 U. S. 654; *United States v. Kimball*, 117 Fed. 156, 164-165 (C. C. S. D. N. Y.); *United States v. Price*, 163 Fed. 904, 907 (C. C. S. D. N. Y.), affirmed 216 U. S. 488.

compelled to answer and the benefit of his testimony is lost.

The first immunity statute relating to judicial proceedings² was the Act of February 25, 1868, 15 Stat. 37, which became Section 860 of the Revised Statutes. This Act applied generally to all judicial proceedings; and provided in effect that no evidence obtained from a witness should subsequently be used against him in a criminal proceeding.³

In *Counselman v. Hitchcock*, 142 U. S. 547, this statute was held unconstitutional because the information obtained through the testimony might be used to build up a case against the witness based on other evidence; since the witness was still subject to prosecution, the statute was not

² The earliest immunity statute was enacted in 1857; it related to testimony before either House of Congress. Act of January 24, 1857, 11 Stat. 155, as amended by Act of January 24, 1862, 12 Stat. 333 (2 U. S. C. 193; 28 U. S. C. 634).

³ Senator Frelinghuysen, reporting the bill orally, stated that it had been discovered in some suits of the United States, where disclosures had been sought from parties, that they had interposed the plea that making disclosure would subject them to forfeiture and penalties; that the courts had recognized such a plea as a sufficient defense against making discovery, and that to "obviate that difficulty and in order that the Government may get such information as is necessary, this bill has been requested on the part of the Government and approved by the Judiciary Committee." See *Cong. Globe*, 40th Cong., 2d sess., pp. 950-951. In the House, Representative Williams of Pennsylvania reported from the Committee on Judiciary as follows (*id.*, at 1334):

"I suggested there were reasons of state for the passage

deemed to "supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates" (142 U. S., at 586).

To meet the objection raised in the *Counselman* case Congress passed the Act of February 11, 1893, 27 Stat. 443 (49 U. S. C. 46), which related only to proceedings under the Interstate Commerce Act.* This statute, which was the model for subsequent immunity provisions up to 1933,

of the bill. Perhaps I may be allowed to state upon this floor there are cases pending in other countries. There is one now pending in England, at the instance of the Government, in reference to the assets of the dead confederacy, where the testimony of parties who acted as agents of that Government, and owning property here, is necessary to make out the case. A bill was filed in equity, but it was pleaded by the party holding this relation that being a citizen of the United States he would be subjected to forfeiture under acts of Congress with which members are familiar. An answer would necessarily involve the disclosure of his relation to the rebel government. On demurrer it was decided by the vice chancellor, and afterwards by the chancellor, that the party could not be held to answer. This testimony is important, and this bill is to put the party in such position that he shall be relieved from the liability to which he is now subject."

*The original Interstate Commerce Act of 1887 (24 Stat. 383) contained an immunity provision in the form held invalid in the *Counselman* case.

provided that "no person shall be *excused*" [italics supplied] from giving evidence which may tend to incriminate him, and then went on (p. 444)—

But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

In 1896 in *Brown v. Walker*, 161 U. S. 591, this Court held that the object of the constitutional provision "is fully accomplished by the statutory immunity" (p. 610), and that the 1893 statute was therefore valid.

In February 1903 similar immunity provisions were included in three additional statutes. The Act of February 14, 1903, 32 Stat. 828, which established the Department of Commerce and Labor, gave the Commissioner of Corporations the same investigatory powers as the Interstate Commerce Commission, and specifically incorporated by reference the immunity provisions of the 1893 act. These provisions were also restated verbatim in the Elkins amendment to the Inter-

state Commerce Act, adopted February 19, 1903, 32 Stat. 848. And in the general appropriations Act of February 25, 1903, 32 Stat. 904 (15 U. S. C. § 32), the paragraph providing appropriations for the enforcement of the Interstate Commerce Act, the Sherman Act, and other statutes, contained a proviso in the same language as the sentence of the 1893 immunity act quoted above.* See also p. 2, *supra*. This is the statute involved in the case at bar. There is no specific reference in the legislative history to the meaning of this proviso, and it must be assumed, as has been held by this Court,* that the Act was intended to have the same meaning as the original Act of 1893.

Shortly afterwards in *United States v. Armour & Co.*, 142 Fed. 808 (N. D. Ill. 1906), Judge Humphrey held that an investigation by the Commissioner of Corporations, pursuant to the Act of February 14, 1903, had granted immunity from the Sherman Act to officials of the meat packing corporations who had made evidence available without subpoena, but under the "compulsion" of the immunity act. In his opinion Judge Humphrey stated (142 Fed. 822-823):

Now, in my judgment, the immunity law is broader than the privilege given by the fifth amendment, which the act was in-

* In 1902 it had been held that the 1893 immunity act did not apply to cases arising under the Sherman Act. *Foot v. Buchanan* (C. C. N. D. Miss.), 113 Fed. 156.

* *Heike v. United States*, 227 U. S. 131.

tended to substitute. The privilege of the amendment permits a refusal to answer. The act wipes out the offense about which the witness might have refused to answer. The privilege permits a refusal only as to incriminating evidence. The act gives immunity for evidence of or concerning the matter covered by the indictment, and the evidence need not be self-incriminating. The immunity flows to the witness by action of law and without any claim on his part.

* * * *

The contention has been made that in order to get immunity the citizen shall wait until the compulsion becomes irresistible. That is the effect of the government contention. I am not able to bring my mind to accept that doctrine. If I am right in saying that immunity flows from the law, without any claim on the part of the defendant—and at different times that has been conceded here in argument—then no act of any kind on his part which amounts to a claim of immunity, which amounts to setting up a claim of immunity, is demanded by the law. * * * When an officer, who has a legal right to make a demand, makes such demand upon a citizen, who has no legal right to refuse, and that citizen answers under such conditions, he answers under compulsion of the law.

This decision was attacked by President Theodore Roosevelt, primarily on the ground that it applied to persons under investigation who had

testified without subpoena,' and on June 30, 1906, an Act was passed (34 Stat. 798, 15 U. S. C. 33) providing that all prior immunity statutes—

shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

The view expressed in the *Armour* case that the statutory immunity was broader than the constitutional privilege was repudiated in *United States v. Heike*, 175 Fed. 852 (C. C. S. D. N. Y., 1910), 192 Fed. 83 (C. C. A. 2), affirmed, 227 U. S. 131. In that case a witness who testified before a grand jury investigating violations of the Sherman Act was subsequently indicted for the entirely separate offense of conspiring to defraud the customs. The Government attorneys investigating the antitrust matter had no idea that their inquiries might reveal violations of the other statutes. The district court overruled defendant's plea in bar, saying (175 Fed., at 858-859):

The immunity provided by this statute was intended to afford an investigation without its being interrupted by the constitutional privilege of silence, or, in other words, under the Constitution, as under the common law, a witness is not obliged to incriminate himself. But to avail himself

¹ 40 Cong. Rec. 5500, quoted in 8 *Winmore, Evidence* (3d ed. 1940) § 2282, p. 518.

of that privilege he must ordinarily assert it. *United States v. Kimball* (C. C.) 117 Fed. 156, 163; *State v. Murphy*, 128 Wis. 201, 107 N. W. 470; 5 Wigmore on Evidence, § 2281a. Whether the immunity statute flows out to a witness testifying depends on circumstances. This statute of immunity must be administered with common sense; on the one hand, some questions are of such character that the witness would understand naturally and inferentially that he would be immune if he answered, and thus proceed to answer without asserting his right, while under other circumstances it would be his duty to assert it if he intended to rely on it. * * *

After the conviction of the defendant, the case came to this Court. This Court's opinion is discussed at some length, *infra*, pp. 31-34. Of significance here is the rejection of the petitioner's argument (227 U. S., at 132) that the immunity statute was to be construed more broadly than the constitutional privilege. Speaking through Mr. Justice Holmes, the Court said (227 U. S., at 142):

Of course there is a clear distinction between an amnesty and the constitutional protection of a party from being compelled in a criminal case to be a witness against himself. Amendment V. *But the obvious purpose of the statute is to make evidence available and compulsory that otherwise*

could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned. We believe its policy to be the same as that of the earlier act of February 11, 1893, c. 83, 27 Stat. 443, which read "No person shall be excused from attending and testifying," &c. "But no person shall be prosecuted," &c., as now, thus showing the correlation between constitutional right and immunity by the form. That statute was passed because an earlier one, in the language of a late case, "was not coextensive with the constitutional privilege." *American Lithographic Co. v. Werckmeister*, 221 U. S. 603, 611. * * * [Italics supplied.]

If, as the above remarks show, the immunity act is to be deemed coextensive with the constitutional privilege, immunity will not be granted under the Constitution unless specifically claimed by the witness. A witness does not obtain the benefit of his constitutional privilege against self-incrimination until and unless he claims it. If the privilege is not claimed, the testimony is voluntary and can be obtained without the immunity statute.

After this Court's description of the scope of the earlier immunity acts the standard immunity pro-

vision was included in a number of statutes, including the Federal Trade Commission Act passed in 1914, and the National Prohibition Act.*

Between 1914 and 1933 (when the standard immunity provision was modified so as to deal specifically with the present problem (see pp. 27-29, *infra*)) a number of lower courts were called upon to decide whether these statutes granted immunity to a witness who had not specifically claimed his privilege.

The earlier cases held that the immunity was so restricted, relying in large part upon the passage quoted above from this Court's opinion in the *Heike* case. The opinion of Judge Grubb in *United States v. Skinner*, 218 Fed. 870 (S. D. N. Y., 1914), appeal dismissed, 242 U. S. 663, contains the most extensive discussion of the problem. In the *Skinner* case the Government contended that the words "no person shall be excused" on the ground that evidence might incriminate him, found

* These statutes are: Mann Act, June 25, 1910, 36 Stat. 826, 18 U. S. C. 402 (3); Federal Trade Commission Act, Sept. 26, 1914, 38 Stat. 722, 15 U. S. C. 49; Shipping Act, Sept. 7, 1916, 39 Stat. 737, 46 U. S. C. 827; National Prohibition Act, Oct. 28, 1919, 41 Stat. 317, 27 U. S. C. 47, repealed by Act of Aug. 27, 1935, 49 Stat. 872; China Trade Act, Sept. 19, 1922, 42 Stat. 854, 15 U. S. C. 135 (c); Grain Futures Act, Sept. 21, 1922, 42 Stat. 1001, 7 U. S. C. 15; Tariff Act, June 17, 1930, 46 Stat. 700, 19 U. S. C. 1333 (e); Perishable Agricultural Commodities Act, June 10, 1930, 46 Stat. 536, 7 U. S. C. 499m (f).

in the first sentence of the 1893 Act,⁹ indicated that the immunity granted in the succeeding sentence was available only to those who "present their excuse upon this ground" (p. 874). Defendant contended that all persons who testified obtained immunity, irrespective of a specific claim. The court thought that "The language of the act is perhaps ambiguous," particularly in view of the opposing decisions of the district courts in the *Armour* and *Heike* cases (R. 874-875). After quoting from the *Heike* opinion of this Court to show that this Court regarded the immunity act as coextensive with the constitutional privilege, Judge Grubb's opinion continued (p. 876):

It was to make available testimony that was unavailable because of the privilege of silence conferred by the terms of the fifth amendment to the Constitution. The testimony that was unavailable, because of that amendment, was that which the witness showed, to the tribunal demanding it, might reasonably tend to incriminate him. It was because such testimony could not be compelled, because of the constitutional amendment, that Congress acted: It was always competent for a person to voluntarily incriminate himself, and Congress was consequently not called upon to legislate with

⁹ This sentence is not found in the Act of February 25, 1903, but the 1893 and 1903 Acts have always been regarded as having the same meaning. *Heike v. United States*, 227 U. S. 131.

reference to incriminating testimony voluntarily given, but only with reference to incriminating testimony which the witness declined to disclose for that reason. The act of Congress of February 11, 1893, consequently, could only have been intended to cover testimony which the government was unable to obtain because of the declination of the witness to answer, based upon its incriminating tendency, and under the protection of the fifth amendment. * * * It was to remove this constitutional bar to the securing of testimony that Congress legislated; and with no purpose to bestow immunity in cases where doing so was not necessary to obtain testimony, which could otherwise be refused. It was not the purpose of Congress to excuse wrongdoing for any other reason than that it was otherwise impossible to secure evidence to punish greater wrongdoing or more wrongdoers. The enforcement of the law and the punishment of those who break it is so essential to the existence of government that it will not be presumed that Congress went further in the direction of exemption than the necessity of the case demanded.

In answer to defendant's contention that the immunity statute itself rendered futile any assertion of the constitutional privilege, Judge Grubb declared (pp. 878-879):

The defendants' contention, however, ignores the right of the government, the other party concerned, to have the witness assert his privilege before examination. It is still a valuable right from the government's point of view. The witness is clothed with an option to testify without asserting his privilege, in which event his testimony is voluntary, and entitles him to no immunity, or to testify only after the assertion of his privilege, and after its denial to him, in which event the evidence given by him is compulsory and entitles him to immunity. The government is entitled to know which option the witness selects. The government is also entitled to be informed, before the examination of the witness, that the witness claims the answer he is asked to give will tend to incriminate him, and in what way. The government is itself clothed with an option which cannot be intelligently exercised until there has been an assertion of privilege by the witness. It is entitled to know whether immunity will follow from the examination of the witness. It has the option to receive the testimony and thereby grant the immunity, or to reject the testimony and deny the immunity. The question of privilege cannot be determined until the witness has been summoned and sworn before the examining tribunal. Then for the first time the government must

make its election. In order to intelligently make the election, it must be apprised first as to whether the witness gives his testimony voluntarily for the purpose of exoneration, or involuntarily, because he would be compelled to testify if he refused. Only in the latter case would immunity flow from his evidence. If the witness fails to assert his privilege, the government would have the right to assume that immunity was not desired by him, and that permitting him to testify would not be attended with that result. If the witness claimed his privilege upon the ground of probable incrimination, then the government would be called upon to elect whether it would proceed with the examination, and so confer the immunity or whether it would abandon the questions and leave the witness unimmune. It could not make this election until it knew (1) that the witness was unwilling to testify, and (2) that and how it was claimed the desired evidence would tend to incriminate. This it could only learn from the witness' assertion of privilege.

* * * The witness is likely to have exclusive knowledge as to what facts and what answers may tend to his incrimination, and with reference to what offenses. Again, the witness alone knows whether he willingly gives his evidence for the purpose of exonerating himself, or only with the

expectation of receiving immunity therefor. He is therefore in a better position to be called upon to assert his constitutional privilege than is the examining tribunal or the law officer of the government to call upon him to elect to do so. If any hardship attends the imposition of this burden on the witness, it has never been considered weighty enough to relieve him therefrom in exercising his constitutional privilege, prior to the immunity statutes. The immunity granted by the statute is a mere substitute for the constitutional safeguard, and has been held by the Supreme Court to be coterminous with it. * * *

Judge Grubb's decision in the *Skinner* case has been followed in a number of cases in the Southern District of New York. *United States v. Elton*, 222 Fed. 428 (S. D. N. Y., 1915); *United States v. Lay Fish Co.*, 13 F. (2d) 136 (S. D. N. Y., 1926) (A. Hand, J.); *United States v. Greater New York Live Poultry Chamber of Commerce*, 33 F. (2d) 1005 (S. D. N. Y., 1929); see also *United States v. Lee*, 290 Fed. 517 (N. D. Tex., 1923) affirmed on other grounds, *sub nom. Sherwin v. United States*, 297 Fed. 704 (C. C. A. 5), affirmed, 268 U. S. 369. The *Skinner* case also seems to have been cited with approval, though not on the point in question here, in *United States ex rel. Vajtauer v. Commissioner*, 273 U. S. 103, 113.

The Circuit Court of Appeals for the Fourth Circuit came to the same conclusion in 1925 in a

case involving the identical immunity provision in the National Prohibition Act. *Johnson v. United States*, 5 F. (2d) 471 (C. C. A. 4, 1925). After examining the earlier legislation and the *Armour* and *Heike* opinions, the Circuit Court of Appeals declared (p. 477):

[The constitutional] privilege would have been to have done either one of two things; to have testified voluntarily or to have refused to testify on the ground of his constitutional privilege. The act was not intended to deal with the cases in which he chose to do the former. Its one object was to meet the situation which arose when the witness elected to claim the right which the Constitution gave him. It was not intended to relieve from the possibility of punishment under other circumstances; or as the Supreme Court said, it did not offer a gratuity to crime.

A construction should not be given to it which would result in a grand jury or prosecuting officer unwittingly conferring immunity upon a serious offender because in the best of good faith, and with no reason to suppose that he was criminally involved in the transaction, he was subpoenaed to produce some documents or to give some testimony which perhaps could just as well have been obtained from other sources. Unquestionably the witness has the constitutional right to object to testifying. Then it is open to the government to elect whether it will or will not proceed with

his examination under the statute, but if it does not, his rights remain as they were before he was called to the stand.

The conclusion that a witness does not obtain immunity unless he claims his privilege has also been reached by Professor Wigmore in both the earlier and the most recent editions of his treatise on evidence. He states:¹⁰

The reason is that the anticipatory legislative pardon or immunity is not authorized absolutely, but only conditionally upon and in exchange for the relinquishment of the privilege. The Legislature did not intend to give something for nothing, i. e. to give immunity merely in exchange for a testimonial disclosure which it could in any event have got by ordinary rules or by the witness' failure to insist on his privilege. The immunity was intended to be given solely as the means of overcoming the obstacle of the privilege; and therefore (irrespective of the precise formality of the judge's procedure) could not come into effect until that obstacle was explicitly presented and thus needed to be overcome. * * *

The first (apart from the *Armour* case) of the cases taking the opposing view is *United States v. Pardue*, 294 Fed. 543 (S. D. Tex.), decided by Judge Hutcheson in 1923. Judge Hutcheson rejected the doctrine of the *Skinner* case in favor

¹⁰ 8 Wigmore, *Evidence* (3d ed., 1940), Section 2282, pp. 510-511; (2d ed., 1923) Vol. 4, pp. 958-959; (1st ed., 1904) Vol. 5, pp. 240-241.

of the reasoning of the *Armour* opinion and decisions by the courts of New York and Wisconsin.¹¹ He said (294 Fed. 548-549):

It appears, then, that here is the simple case presented: That following the very words of the statute, and proceeding in accordance with its exact requirement, this defendant under a subpoena having testified, and now claiming his immunity springing thereout, no greater and no different from what the statute says would follow his act, is met by the government with the proposition that he did not *claim anything* at the time he testified, and therefore he cannot now have it. The government, in short, wants to write a statute after the fact, saying: Congress did not mean what it said when it in plain language told you that, if you testified in obedience to a subpoena, you could not be prosecuted. What Congress meant to say is that, if you testify in obedience to a subpoena, and after you have told the commission that you do not want to testify, and after *you have claimed protection against self-incrimination*, you can then claim immunity from prosecution. With this contention I cannot agree.

¹¹ The New York decision relied upon was *People v. Sharp*, 107 N. Y. 427. The Wisconsin decision was *State v. Murphy*, 128 Wis. 201, decided by a sharply divided court, and overruled on this point in *Oarchidi v. State*, 187 Wis. 438 (1925), and *State v. Groznickie*, 189 Wis. 17 (1926). Judge Hutcheson also relied upon *United States v. Swift*, 186 Fed. 1002 (N. D. Ill.), but that case does not appear to support the proposition for which he cites it.

* * * *Upon the controlling issue of fact in cases of this kind, however, whether a witness testified voluntarily or upon compulsion, if a witness appears under a subpoena and is placed upon the stand by the Government, the fact of compulsion is prima facie established, and the burden shifts to the Government to show that, notwithstanding all of the indicia of compulsory testimony, the witness in fact waived his privilege, and testified voluntarily. [Italics in original.]*

The *Pardue* case has been followed in *United States v. Moore*, 15 F. (2d) 593 (D. Ore., 1926) and *United States v. Goldman*, 28 F. (2d) 424 (D. Conn., 1928). See also *United States v. Ward*, 295 Fed. 576 (W. D. Wash. 1924).

By 1933 the lines of conflicting authorities were well established.¹² The Securities Act passed in

¹² Decisions in the state courts are also in conflict. The following hold that the witness must claim his privilege. *State v. Grosnickle*, 189 Wis. 17, 206 N. W. 895 (1926); *Cardichi v. State*, 187 Wis. 438, 204 N. W. 473 (1925); *State v. Backstrom*, 117 Kan. 111, 230 Pac. 306 (1924); *Ross v. Crane*, 291 Mass. 28, 195 N. E. 884 (1935); *Hunter v. State*, 72 P. (2d) 399 (Okla. Cr.) (1937); *People v. Reggel*, 8 Utah. 21, 28 Pac. 955 (1892). Cf. *People v. Carter*, 297 Mich. 577, 298 N. W. 288 (1941).

Contra: People v. Sharp, 107 N. Y. 427, 14 N. E. 319 (1887); *Doyle v. Willcockson*, 184 Iowa 757, 169 N. W. 241 (1918); *Metz v. State*, 217 Ind. 293, 27 N. E. (2d) 761 (1940); *State v. Cuprio*, 98 N. J. L. 13, 119 Atl. 81 (1922), affirmed, 99 N. J. L. 292, 130 Atl. 377 (1923); *Nelson v. State*, 41 Ohio App. 174, 180 N. E. 84 (1931); *Fine v. State*, 112 Tex. Cr. 652, 185 S. W. (2d) 156 (1929). Cf. *People v.*

that year for the first time dealt specifically with the present problem. Section 22 of that Act, which was originally to be administered by the Federal Trade Commission, inserted in the language used in the prior immunity statutes the proviso that the immunity was available to a person only "after having claimed his privilege against self-incrimination." 48 Stat. 86, 15 U. S. C. 77v (c). Most of the many regulatory statutes passed since 1933 have contained an immunity provision in the same language as the Securities Act.¹² The Fair Labor Standards Act and the Motor Carrier Act, to mention the most important, however, incorporated by reference the provisions of the

Finkelstein, 299 Ill. App. 363, 20 N. E. (2d) 290; reversed on other grounds, 372 Ill. 186, 23 N. E. (2d) 34 (1939).

¹² Securities Exchange Act, June 6, 1934, 48 Stat. 900, 15 U. S. C. 78u (d); Communications Act, June 19, 1934, 48 Stat. 1097, 47 U. S. C. 409 (i); National Labor Relations Act, July 5, 1935, 49 Stat. 456, 29 U. S. C. 161 (3); Federal Power Act, Aug. 26, 1935, 49 Stat. 858, 16 U. S. C. 825f (g); Public Utility Holding Company Act, August 26, 1935, 49 Stat. 832, 15 U. S. C. 79r (e); Merchant Marine Act, June 29, 1936, 49 Stat. 1991, 46 U. S. C. 1124 (c); Bituminous Coal Act, April 26, 1937, 50 Stat. 87, 15 U. S. C. 838 (b); Natural Gas Act, June 21, 1938, 52 Stat. 829, 15 U. S. C. 717m (h); Civil Aeronautics Act, June 23, 1938, 52 Stat. 1022, 49 U. S. C. 644 (i); Railroad Unemployment Insurance Act, June 25, 1938, 52 Stat. 1107, 45 U. S. C. 362 (c); Social Security Act, August 10, 1939, 53 Stat. 1370, 42 U. S. C. 405 (f); Investment Company Act, August 22, 1940, 54 Stat. 842, 15 U. S. C. 80a-41 (d); Investment Advisers Act, August 22, 1940, 54 Stat. 853, 15 U. S. C. 80b-9 (d).

original Federal Trade Commission Act and the Interstate Commerce Act,¹⁴ with the result that a few of the modern statutes do not contain the express proviso requiring the claiming of the privilege.

II

IMMUNITY IS NOT GRANTED TO A PERSON WHO TESTIFIES WITHOUT CLAIMING HIS PRIVILEGE

A. The immunity legislation was not intended to give greater protection than is required by the Constitution.

The immunity statutes are not to be construed as if they stood alone. The provision of the Fifth Amendment, traditionally interpreted to require the claiming of the privilege, is in *pari materia*. Just as two laws on the same subject must be given a harmonious interpretation, so must the Constitution and the immunity acts. It is not sufficient, therefore, to look solely to the words of the immunity acts without regard for their constitutional background. The constitutional immunity is the very subject of the statute.

Under the Constitution and the common law, a witness was required to claim his privilege

¹⁴ The statutes since 1933 in which the old form still appears are: Motor Carrier Act, August 9, 1935, 49 Stat. 550, 49 U. S. C. 305 (d); Industrial Alcohol Act, August 27, 1935, 49 Stat. 875, 26 U. S. C. 3119; Fair Labor Standards Act, June 25, 1938, 52 Stat. 1065, 29 U. S. C. 209.

(*supra*, pp. 9-10). In these circumstances, the absence of Congress to insert a specific provision to that effect in the original immunity acts may be regarded as indicating that Congress assumed that, except where modified by the statutes, the long recognized rule as to the necessity of the claim would still stand. The subsequent inclusion of such a requirement in most of the immunity clauses enacted after the matter was presumably first brought to the attention of Congress, in 1933, confirms this view (see pp. 27-29, *supra*, pp. 40-42, *infra*).

It is apparent from the history of the immunity legislation that its purpose was to aid the Government in enforcing the laws by removing the obstacle of the privilege. The statute involved in the *Counselman* case did not go far enough to accomplish this. To satisfy the constitutional requirements Congress enacted the statute upheld in the *Brown* case. The sole object of the immunity provision was to enable the Government to compel testimony which could not otherwise be obtained because of the privilege. If a witness testifies voluntarily without claiming his privilege, no obstacle is presented; there is under such circumstances no reason for the operation of the immunity provision. If, however, the witness claims his privilege, the testimony can not be secured without the immunity statute; there is then occasion for the operation of the immunity statute to

enable the Government to get the testimony, if it so desires, in which event the witness obtains immunity. There is nothing in the legislative history which indicates that Congress intended to give a reward or bonus for testifying where no immunity is claimed or desired; there is nothing indicating an intention to give immunity for evidence which could have been obtained through failure or lack of desire of the witness to assert his privilege. It is not reasonable to assume that Congress intended to defeat its very purpose of making administration of the laws more effective by gratuitously immunizing individuals without the desired advantage of securing testimony which the Government would not otherwise have been able to get.

Support for this interpretation of the statute is provided by a consideration of the language of the immunity statute upheld in the *Brown* case. This statute reads: "No person shall be excused" from giving incriminating evidence; "But no person shall be prosecuted" for anything concerning which he produces evidence. The relation of these two passages demonstrates the correlation in the mind of Congress between the constitutional privilege and the immunity granted; Congress quite obviously had in mind an exchange of immunity for compulsory testimony. Although the language of the statute involved here is not the same, it is clear that its policy is identical. See *Heike v. United States*, 227 U. S. 131, 142.

The Act was so interpreted in the *Heike* case. In that case the defendant, who had been indicted for frauds on the revenue and a conspiracy to commit such frauds, pleaded in bar that he had testified and produced documentary evidence in response to a Government subpoena in a grand jury investigation of alleged violations of the Sherman Act. He contended that the words of the statute—that no person should be prosecuted for any matter “concerning which he may testify or produce evidence”—were broad enough to give him amnesty from liability for every offense connected in any degree with the matter concerning which he had testified, or at least for every offense toward the discovery of which his testimony led, even if it had no actual effect in bringing about the discovery (227 U. S., at 141). In support of this contention he argued that the immunity statute bore no analogy, either in conditions of acquirement or in mode of operation, to the constitutional privilege (227 U. S., at 132); and that Congress intended the immunity provision as a reward permitting some guilty persons to escape in order to secure the evidence desired (227 U. S., at 141). The Government contended, on the other hand, that the statute should be limited by the boundaries of the constitutional privilege.

The Court first considered the purpose of the immunity statute and its relation to the constitutional privilege, and concluded that “the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be

got.¹⁵ We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned" (227 U. S. 131, 142). Applying the statute in accordance with this pronouncement, it was then held that the plea could not stand for the reasons that (1) the evidence in the former proceeding "did not concern the present one and had no such tendency to incriminate the petitioner as to have afforded a ground for refusing to give it"; and (2) the documents involved were documents of the corporation which were not protected by the constitutional privilege (p. 143).

The Court did not deny that the language of the statute, if given a literal construction, was broad enough to have included this evidence. In a loose sense the evidence could have been said to "concern" a "transaction, matter, or thing," for which the defendant was prosecuted. But this Court held that "When the statute speaks of testimony concerning a matter it means concerning it *in a substantial way, just as the constitutional protection is confined to real danger* and does not extend to remote possibilities out of the ordinary course of law" (227 U. S., at 144). [Italics supplied.] Thus by construing the provision as "coterminous with what otherwise would have been the

¹⁵ See also *Brown v. Walker*, 161 U. S. 591, 610.

privilege (p. 142)," the Court limited application of the statute to evidence which was protected by the privilege, evidence which had such a "tendency to incriminate" the witness "as to have afforded a ground for refusing to give it" (p. 143).

Thus the rationale of the *Heike* case was that the statute gave immunity only for evidence that was privileged, although the statute itself did not contain any such express limitation. The same reasoning when applied to this case would seem to lead to the result that no immunity is given by the statute unless the privilege is claimed. If the privilege is not claimed, the testimony is voluntary and can be obtained without the immunity statute. It is only when the privilege is claimed and the evidence compelled that there is occasion for the operation of the statute. If the statute is not so limited, the result would be to extend a governmental bounty to violations of law by gratuitously immunizing people liable to prosecution; and, as this Court said in the *Heike* case, it cannot be supposed "that the act offered a gratuity to crime."

B. A construction of the statute which would give immunity without the claim of privilege would lead to unreasonable consequences

Our position is also supported by the unreasonable results which would follow if immunity were automatically furnished under the statute without

any claim of privilege. All statutes should, of course, be given a sensible construction and "a literal application of a statute, which would lead to absurd consequences should be avoided wherever a reasonable application can be given to it, consistent with the legislative purpose." *United States v. Katz*, 271 U. S. 354, 357; *Sorrells v. United States*, 287 U. S. 435. "General terms should be so limited in their application as not to lead to injustice * * * or an absurd consequence. It will always * * * be presumed that the legislature intended exceptions to its language, which would avoid" unreasonable results. "The reason of the law in such cases should prevail over its letter." *United States v. Kirby*, 7 Wall. 482, 486-487; *Church of the Holy Trinity v. United States*, 143 U. S. 457.

In grand jury proceedings the Government often does not know whether, or to what extent, a particular witness participated in the crime being investigated. Witnesses are frequently called because they hold positions of some responsibility with the organizations under investigation, and it may not be known what their testimony will be. Under such circumstances, if immunity applies without the privilege being claimed, the Government prosecutor proceeds at the constant risk of unintentionally giving immunity. Not knowing whether the answer will incriminate the witness, he cannot exercise any judgment as to whether immunity should be given

in exchange for the testimony or whether it would be preferable to lose the testimony and retain the right to prosecute the witness for his crime, if evidence showing his participation should be obtained from other sources. At the moment the answer is given the prosecutor would unwittingly have given immunity. Such a result would plainly work an unreasonable hardship upon the public. On the other hand, the witness has full knowledge concerning his participation in the offense. He is well aware as to whether his answer would tend to incriminate him. It is fair, therefore, to require him to claim his privilege and thus put the prosecutor on notice, thereby giving the latter an opportunity to elect between extending immunity or withdrawing the question.

The unreasonableness of applying the immunity statutes to testimony voluntarily given becomes even more apparent in a case where the incrimination of the witness relates to an offense other than that under investigation by the examining tribunal. Although those are not the facts in this case, the ruling of the court below would apply equally under both sets of circumstances. In such a case the government prosecutor quite obviously would not be in any position to anticipate all the crimes which the witness may have committed, nor the relation of the evidence sought to those crimes. Yet he would be required to proceed with his examination at the risk of giving immunity, without any intention whatever, for one or more

offenses of the witness. The witness, with full knowledge of the incriminating nature of his answers, could obtain complete amnesty for his crimes without ever putting the prosecutor on notice as to the circumstances.

In fact, under a strict interpretation of the immunity statute, without regard to the constitutional provision with which it must be construed, it would be within the power of the witness to use an investigation to purge himself of his crimes by taking every opportunity to give information concerning them. We do not suppose, of course, that a witness could obtain immunity by volunteering information which was not responsive to questions asked him. But the same result might well be accomplished even while giving responsive answers. No prosecutor could so limit his questions as not to give the opportunity for an answer incriminating under some statute, particularly when he has no knowledge as to the offenses which the witness may have committed.

In this connection it should be noted that in other respects it has been held that the immunity statutes cannot be given a strictly literal construction isolated from the Constitution. Although the statutory language is broad enough to give immunity to any person who testifies no matter by whom he may be called, it has been uniformly held that immunity is given under the

statutes only when the witness is called to testify on behalf of the Government, and not when the witness is called by another defendant. *Brady v. United States*, 39 F. (2d) 312, 314 (C. C. A. 8); *Smith v. United States*, 58 F. (2d) 735, 736 (C. C. A. 5), certiorari denied, 287 U. S. 617; *United States v. Ernest*, 280 Fed. 515 (D. Mont., 1922); *In re Petraeus*, 12 Cal. (2d) 579, 86 P. (2d) 343 (1939); *Ivey v. State*, 153 Miss. 41, 120 So. 449 (1929); *State v. Archambault*, 72 Mont. 259, 232 Pac. 1107 (1925); *Commonwealth v. Magistrate Hamburg*, 104 Pa. Super. 221, 158 Atl. 629 (1932); 8 Wigmore, *Evidence* (3d ed., 1940), p. 516. It would, of course, be absurd to interpret the statutes to give immunity to a witness called by a defendant, for under such a construction defendants could combine to immunize each other.

The fear of the District Court that to require the claim of privilege takes advantage of the witness or "lays a trap for the unwary" seems to be unfounded. The requirement that the privilege must be claimed stems from the Constitution, not from the statute; and it has always been the rule that the Government is not required to advise the witness of his constitutional privilege. The result of the decision below is that the immunity statute, although it does not expressly state whether or not the privilege must be claimed, eliminates this requirement and gives the witness immunity al-

though he voluntarily testifies and gives no indication that he desires to claim his privilege or that the testimony tends to incriminate him. The immunity statute was not intended to enlarge the rights of the witness, or to be expressive of or change the requirement concerning the claiming of the privilege. In this regard the statute neither lessened nor expanded the rights of witnesses; their position is the same as it was under the Constitution. The statute simply provides a means of obtaining testimony by extending immunity when the constitutional privilege is invoked. It gives the Government a choice, to be exercised in the public interest. The witness may be compelled to testify; if so, he may not be held accountable even though his testimony incriminates himself. Or he may retain the privilege and be liable for prosecution for the matters about which he fails to testify.

C. The legislative background supports this conclusion

Inasmuch as there was no definite statement of the legislative understanding on this point in connection with the 1903 Act itself, arguments based upon legislative history necessarily involve analysis of less direct manifestations of congressional intent.

It may be said that the early legislative background gives rise to conflicting inferences. The

appellees argued below that the failure to include an express requirement that immunity be claimed in the amendment adopted to avoid the effect of the *Armour* decision, despite the dictum by Judge Humphrey that the statute did not so require, indicates that Congress was content to let his opinion stand to that extent.¹⁶

We believe, however, that looked at as a whole, the legislative history supports our position. The history of the 1893 Act, in the light of what this Court had said in the *Counselman* opinion and the construction subsequently adopted in *Brown v. Walker, supra*, pp. 10-12, indicates that Congress was only seeking to comply with the constitutional mandate, as construed by this Court, and not to give immunity to a greater extent than necessary. The use of the original language, in statutes passed after the *Heike* decision had suggested that the immunity provision was to be co-extensive with the constitutional privilege, also supports this construction.

¹⁶ That Congress recognized that there were other disputed questions, but intended this amendment only to clarify its intention with respect to the necessity of a subpoena, appears from the statement of Senator Knox, who sponsored the amendment. He stated (40 Cong. Rec. 7657):

"Mr. President, the purpose of this bill is clear, and its range is not very broad. It is not intended to cover all disputed provisions as to the rights of witnesses under any circumstances, except those enumerated in the bill itself. * * *

Furthermore, the inclusion within most of the immunity clauses since 1933 of a specific requirement that immunity be claimed is a strong indication of the manner in which Congress always intended the immunity acts to operate. The legislative history of these recent provisions does not show why the change was made. It would seem likely, however, that it was because of the conflict in the decisions in the lower federal courts as to the interpretation of the earlier provisions. Evidently Congress thought it wise to express its intention clearly so as to eliminate all possibility of the contention that the statute extended immunity automatically.

We believe it clear that the addition of the specific requirement was not intended to change the substance of the law, but to conform the statute to the original intention of Congress.¹⁷ There is no reason to suppose that Congress would have intentionally given the agencies charged with the enforcement of the Interstate Commerce Act, the Sherman Act, and the Federal Trade Commission Act less power or subjected them to greater restrictions than agencies administering such stat-

¹⁷ Cases arising under the newer immunity acts have required that the privilege be claimed without suggesting that the procedure under the new immunity clauses was different from that under the old. *United States v. Shaw*, 33 F. Supp. 531 (S. D. Cal.) (Securities Act of 1933); cf. *United States v. Mary Helen Coal Corp.*, 24 F. Supp. 50 (E. D. Ky.).

utes as the Securities Act, the Securities Exchange Act, the Federal Power Act, or the Civil Aeronautics Act, to mention only a few. Moreover, Congress would not have been likely to have provided different immunity provisions for the Federal Trade Commission in administering the Federal Trade Commission Act and the Securities Act. Nor do we think it would have deliberately placed greater restrictions upon the administrator of the Fair Labor Standards Act of 1938 (which incorporates the procedural provisions of the Federal Trade Commission Act) than upon the National Labor Relations Board, the Bituminous Coal Commission, and most other agencies created during the same period. No reason can be suggested for attributing to Congress an intention to differentiate between one group of agencies and another in a matter of this kind, in a series of regulatory statutes enacted at about the same time.

All of these statutes are obviously designed to accomplish the same purpose, namely, to make available evidence which could not otherwise be obtained because of the privilege. There is no reason to believe that Congress thought it necessary, or intended, to give a broader immunity in one case than in another. The incorporation of the additional phrase, therefore, does not amount to a change in policy; rather, it is a more explicit expression of the manner in which Congress always intended the immunity statutes to operate.

Cf. *Jordan v. Roche*, 228 U. S. 436, 445-446; *Helvering v. N. Y. Trust Co.*, 292 U. S. 455, 468-469; *Luckenbach S. S. Co. v. United States*, 280 U. S. 173, 182-183.

CONCLUSION

For the above reasons it is respectfully submitted that the judgment of the court below should be reversed.

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NOVEMBER 1942.

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CHARLES ELMER SHAFLEY

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

No. 248

THE UNITED STATES OF AMERICA,

Appellant,

vs.

WILLIAM F. MONIA AND L. AUBREY WILLIAMS,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEES.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

No. 248.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

WILLIAM F. MONIA AND L. AUBREY WILLIAMS,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEES.

The statement of the case set forth in the brief of the Government (pp. 3-6) correctly and adequately states the facts. The Government's statement of the question presented (Br. p. 2), however, is incorrect, in that it includes the false issue of willingness or unwillingness of the witness to testify. See *infra*, pp. 5 to 7. The sole question involved in this case is: Must a witness who has been personally subpoenaed by the Government claim the constitutional privilege against self-incrimination in order to secure immunity from prosecution under the immunity provisions of the Sherman Act in addition to appearing before a grand jury pursuant to the subpoena and there testifying under oath substantially concerning matters on account of which he is subsequently indicted by the same grand jury?

SUMMARY OF ARGUMENT.

I.

The statute contains no words which could possibly bear a construction imposing upon a witness the obligation of claiming the privilege of silence under the Fifth Amendment to the Constitution. *Heike v. United States*, 227 U. S. 131, is distinguishable because the Court there construed the words of the statute. This Court should not incorporate in the statute the condition precedent sought by the Government, because the statute is clear and unambiguous and the statutory requirements of subpoena and oath preclude the incorporation of a further and additional condition.

The Government in its brief presents no judicial reason for imposing upon the witness compliance at his peril with an unexpressed condition precedent. The Government's contention if allowed makes of the statute a trap to ensnare the unwary. Its argument and that contained in its leading authority, *United States v. Skinner*, 218 Fed. 870, are based upon considerations of expediency wholly unsupported by the statute.

II.

The legislative history of the antitrust immunity statute shows that Congress did not intend to require a witness to claim privilege under the Fifth Amendment in order to obtain immunity from prosecution. The first immunity statute which later became Section 860 of the Revised Statutes did not require a claim of privilege as a condition precedent to the earning of immunity thereunder. This Court held that that statute did not deprive

a witness of the right to claim privilege if the witness desired to assert it. *Counselman v. Hitchcock*, 142 U. S. 547. Congress thereupon passed an act designed to deprive the witness of the constitutional privilege, which act this Court held accomplished that purpose because it operated to take out of the purview of the Fifth Amendment the class of persons who came within the definition of the statute and because it constituted a legislative grant of general amnesty to such persons. *Brown v. Walker*, 161 U. S. 591.

This Court likewise held that the first of the antitrust immunity acts, the Act of February 25, 1903, barred a witness from standing upon his constitutional privilege of silence. *Hale v. Henkel*, 201 U. S. 43. In *United States v. Armour and Company*, 142 Fed. 808 the Government contended that the 1903 Act required testimony under oath and pursuant to subpoena. The court held the act imposed no such conditions. The Government conceded and the court held that no claim of any kind was required of the witnesses.

In this setting and to give effect to the demands of the Government in the *Armour* case and to meet the consequences of that decision, Congress enacted the second of the antitrust immunity acts, the Act of June 30, 1906. The debates thereon show that Congress intended to impose upon the witnesses only the conditions expressly particularized in the statute.

The 1903 and 1906 Acts are hereinafter sometimes referred to as the antitrust immunity statute.

ARGUMENT.

The antitrust immunity statutes are:

"* * * no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts (the Sherman Anti-trust Act and others); Provided further, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.¹

"* * * immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."²

The Government admits and the record shows that each of the appellees was personally subpoenaed by the Government and testified under oath before the grand jury in a substantial way concerning the matters for which each was subsequently indicted by the same grand jury. By so doing each complied fully with the express provisions of these acts and the Government nowhere in its brief contends otherwise. The burden of appellees' argument is that nothing more than compliance with the statute was required of them. The Government, on the other hand, contends that in the circumstances of record appellees should also have claimed the privilege under the Fifth Amendment. Instead of proving this contention anywhere the Government throughout its brief assumes without proof that appellees were under a legal requirement to assert a claim of privilege.

The Government argument falls into this error by posing demonstrably false and wholly arbitrary definitions.

1. Act of February 25, 1903, 32 Stat. 854, 904, 15 U. S. C. 32.

2. Act of June 30, 1906, 34 Stat. 798, 15 U. S. C. 33.

of the terms, voluntary and involuntary testimony. The Government in its brief from beginning to end assumes or asserts that appellees testified voluntarily.

In the argument of the Government testimony is voluntary when a witness does not assert the constitutional privilege, and testimony is involuntary when a witness does assert his constitutional privilege and is thereafter required to testify. By so equating voluntary testimony to testimony given without assertion of the claim of privilege, the Government necessarily considers that testimony given in strict compliance with the express terms of the immunity statute under subpoena and oath can never be involuntary testimony. But as stated above the very question in issue is whether in the circumstances of record appellees were legally required to claim the privilege. The Government argument therefore begs the question in issue.

We also point out here that the Government attempts in its brief to bring in issue a matter which is not properly before the Court.

In its statement of the Question Presented (Br. p. 2), the Government seeks to have this Court hold that appellees should either (1) have claimed their constitutional privilege or (2) have indicated in some way "*an unwillingness to testify*". In the argument (Br. p. 7) the same alternatives are used: "*They [appellees] did not claim their privilege against self-incrimination; and they never disclosed or indicated an unwillingness to testify*". Again the Government's brief at page 8 states the alternatives as maximum and minimum requirements. It is there asserted that the immunity statute "*applies only when the witness claims his privilege or at least indicates an unwillingness to testify*".
• • •

Ready answers suggest themselves to this alternative of "*unwillingness to testify*". The more obvious of these answers are (1) the incongruity of the Government urging

contumacy on the part of a witness and the citizen suggesting that in the circumstances he is entitled to be forthright and candid; (2) the law never puts a premium on recalcitrance; (3) a "disclosure or indication of an unwillingness to testify" is not a legal requirement recognized either under the Fifth Amendment or under the immunity statute; and (4) the paradox of the Government insisting upon the necessity of an affirmative showing of recalcitrance in connection with a statute, the prime purpose of which was to obviate and overcome recalcitrance on the part of witnesses.

But prescindng from these valid answers we respectfully point out to the Court that this suggested standard of "unwillingness to testify" cannot be urged here. The record in this case fails to lend support to such a contention for the following reasons:

(1) The only language contained in either plea in any way relating to the willingness or unwillingness on the part of the witnesses to testify shows that each was "compelled" to testify (R. 9, 12). We make no point here as to whether such language constitutes an allegation of fact or a legal conclusion. With only general demurrers interposed to this language the Government is hardly in a position to make any dogmatic assertions in this Court as to whether the appellees were or were not willing witnesses.

(2) The only special ground urged by the Government in its general demurrers to the special pleas of appellees is:

"Third: That said plea does not allege that the defendant L. Aubrey Williams claimed the privilege against self-incrimination afforded by the fifth amendment to the Constitution of the United States, and consequently neither the fifth amendment to the Constitution of the United States nor section 32 of Title 15, U. S. C. A., commonly known as the immunity statute, has any application." (R. 13.)

1. Precisely the same grounds are urged against the plea of appellee Monia (R. 24).

The Government, having rested its case in the lower court solely upon the failure of appellees to allege in their pleas that they claimed privilege under the Fifth Amendment, may not now urge here for the first time that the pleas are defective for failure to allege that the appellees were "unwilling to testify." The Government should certainly not be permitted to take a position here other and different than that taken by it in the court below.

I.

The Antitrust Immunity Statute Does Not Require a Witness to Assert a Claim of Privilege Under the Fifth Amendment to the Constitution in Order to Earn Immunity from Prosecution.

The immunity provisions of the Sherman Act are singularly clear and unambiguous with respect to the conditions upon which immunity will be granted. The statute does not by its terms impose upon any witness the obligation of claiming the privilege against self-incrimination as a condition precedent to immunity and the statute contains no word or group of words which can possibly bear such a construction. The statute unqualifiedly prohibits the prosecution of a natural person who in obedience to a subpoena gives testimony under oath.

A. The Statute Is Clear and Unambiguous; It Contains No Words Which Can Be Construed to Require a Witness to Assert the Constitutional Privilege:

The first anti-trust immunity act, that of February 25, 1903, provides without any limitation whatsoever that no person shall be prosecuted on account of any transaction concerning which he may testify in any proceeding under the Sherman Act. There are clearly no words in the Act of 1903 susceptible of a construction imposing upon a

witness the requirement of claiming the privilege. The Government points out no such words in its brief.

The second act, that of June 30, 1906 is entitled "An Act Defining the right of immunity of witnesses under the Act entitled * * *" and provides that "immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath. * * *" Again, in this act, no words can be or are pointed out by the Government which impose upon a witness the condition precedent intended for by it.

The absence from the statute of any words which could possibly bear a construction imposing upon a witness the condition of claiming his constitutional privilege of silence precludes any such construction. " * * * the plain obvious and rational meaning of a statute is always to be preferred to any curious, narrow or hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364, 370. See also *Helvering v. San Joaquin Co.*, 297 U. S. 496; *Old Colony Railroad Co. v. Com'r*, 284 U. S. 552, 560; *United States v. Thind*, 261 U. S. 204. The principle is particularly applicable in the case at bar, of course, for this is not a "hard case." Each of appellees in strict compliance with the statutory requirements earned his amnesty by testifying in a substantial way to the matters charged in the indictment, which was the very result sought by the enactment of the statute.

The Act of June 30, 1906, is a clear and affirmative legislative definition of the persons entitled to the right and of the conditions under which such persons shall be entitled to immunity. The definition is threefold. The right shall extend only to (1) a natural person who (2) in obedience to a subpoena (3) gives testimony under oath. By such a precise and definite particularization of the limits of the

right, Congress clearly negatived the existence of any further or other limitations. *Expressio unius est exclusio alterius*. *Continental Casualty Co. v. United States*, 314 U. S. 527, 533.

The Government asks this Court to incorporate into the statute devoid of any expression of Congressional intention to that effect, a proviso in substance as follows:

"Provided, that no person shall be entitled to immunity hereunder unless he shall, before testifying, state that he claims his privilege against self-incrimination."

Assuming, *arguendo*, that it could be demonstrated that Congress intended to include such a provision (the opposite is the case, see *infra*, pp. 18 to 25), this Court has repeatedly held that in the construction of statutory language "to supply omissions transcends the judicial function."

In *Iselin v. United States*, 270 U. S. 245, 250-251, this Court, through Mr. Justice Brandeis, stated with respect to a tax statute which the Government contended should be extended beyond its terms to effectuate Congressional intent:

"* * * The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."

See also to the same effect: *Wallace v. Cutten*, 298 U. S. 229, 237; *United States v. Weitzel*, 246 U. S. 533, 543.

The case of *Heike v. United States*, 227 U. S. 131, does not support the Government's position. In that case this Court denied a claim for amnesty because the evidence given by the witness was not incriminating. Such evidence, "neither led nor could have led to a discovery of

his crime." *Edwards v. United States*, 312 U. S. 473, 480. This Court arrived at the decision in the *Heike* case by interpreting the words of the immunity statute itself, and for the purpose of interpreting the statutory words, considered the Fifth Amendment as being in *pari materia*. We do not quarrel with the propriety of construing words and clauses as they exist in the statute with the Constitutional Amendment in mind. We do object, however, to incorporating into the statute a provision which is not indicated in any manner and which completely changes the meaning and the effect thereof. That this Court would not have gone that far had the issue been presented in the *Heike* case is indicated in the following statements of the opinion:

142 " . . . It [the immunity statute] should be construed, *so far as its words fairly allow the construction*, as coterminous with what otherwise would have been the privilege of the person concerned.

144 " . . . When the statute speaks of testimony concerning a matter it means concerning it in a substantial way just as the constitutional protection is confined to real danger and does not extend to remote possibilities out of the ordinary course of law." (Italics ours.)

Reference to prior acts or to constitutional provisions may not be made, of course, to interpret Congressional intention where the act under consideration is clear upon its face and standing alone is susceptible of but one construction. *Hamilton v. Rathbone*, 175 U. S. 414, 419. The immunity provisions of the Sherman Act are exceedingly clear respecting the conditions with which a witness must comply in order to secure immunity. Such provisions are not susceptible of the construction for which the Government contends, and therefore, recourse to extraneous aids to construction is unnecessary and improper.

The decisions of lower Federal courts are in conflict, as

stated in the Government's brief (pp: 17-26, 27). In *United States v. Goldman*, 28 F. (2d) 424 (D. C. D. Conn., 1928), the court held that a defendant was entitled to immunity under the applicable provisions of the Prohibition Act, which provisions were substantially the same as those here under consideration. The defendant there had not asserted his Constitutional privilege and had not claimed immunity. In rejecting the same contention as is made by the Government in the case at bar the court stated as pages 435-36:

"The inquiry into legislative motives is often difficult and delicate, when the language of the statute is obscure. When the language is plain and unambiguous, courts hold no commission to alter it, to suit their conception of the motives which prompted the legislative will. If the plain wording of a statute does not really say what it was intended that it should say, then the place to reform the act is in the Congress, and not in the courts. But, were I minded, in this instance, to speculate on the legislative intent, I would say that Congress never intended to enact an equivocation; that it did not cunningly conceal within the body of the statute a proviso or limitation wholly undiscernible to the layman, and visible, if at all, only to the sophisticated vision of a legal casuist. Congress did not intend to construct a trap for the unlearned or unwary; nor did it intend that the meaning of some barren formula should be the prerequisite of admission to grace in exchange for something done. If amnesty were to be available only to those who protested, it would have been a simple matter for the Congress to have added to section 30 the following language:

" 'But no person shall be entitled to the benefits hereof unless he shall, before testifying, declare to the court his refusal to testify on the ground of self-incrimination.' "

In *United States v. Pardue*, 294 Fed. 543 (D. C. S. D., Texas, 1923), which involved the immunity provisions of Section 9 of the Federal Trade Commission Act, Judge Hutcheson rendered an equally strong opinion in overruling

the Government's demurrer to a plea in bar. The court's opinion there is quoted in part in appellant's brief (pp. 25-26). The same view was taken by the courts in *United States v. Ward*, 295 Fed. 576 (D. C. W. D., Wash., 1924), and *United States v. Moore*, 15 F. (2d) 593 (D. C. D., Ore., 1926).

B. The Statute Prohibits the Prosecution of a Natural Person Who in Obedience to a Subpoena Gives Testimony Under Oath.

Under the immunity statute the witness's amnesty is an immunity from prosecution. It is because of the fact that all prosecutors are prohibited from prosecuting that the witness is said to have "absolute immunity."

The Government in effect argues (Br. pp. 35-36—and the same fallacious argument is made in the Government's principal authority, *United States v. Skinner*, 218 Fed. 870 (S. D. N. Y., 1914) contrary to the plain words of the statute, that the statute contains a delegation to the particular prosecutor interrogating the witness of the right to "grant" or "withhold" immunity at will rather than an imperious unqualified mandate upon prosecutors—all prosecutors—not to prosecute the witness under the circumstances stated.

Upon this false premise the District Court in the *Skinner* case and the Government in its brief contend paradoxically that the immunity statute has converted the constitutional option of silence on the part of the citizen into (1) an option in favor of the particular prosecutor asking the questions to elect whether he will allow the immunity statute to operate, plus (2) a duty on the part of the witness to inform the prosecutor asking the questions whether or not the witness is seeking to have the immunity statute operate.

In order that there shall be no doubt that we are correct in this statement we refer the Court to pages 21, 22 and

35-37 of the Government's brief. The exact words of Judge Grubb in this connection appear as follows (Br. p. 21):

"* * * The government is itself clothed with an option which cannot be intelligently exercised until there has been an assertion of privilege by the witness. It is entitled to know whether immunity will follow from the examination of the witness. It has the option to receive the testimony and thereby grant the immunity, or to reject the testimony and deny the immunity. * * *"

Following this piece of casuistry wholly unsupported by authority the Government asserts (Br. p. 35):

"* * * the Government prosecutor proceeds at the constant risk of unintentionally giving immunity. Not knowing whether the answer will incriminate the witness, he cannot exercise any judgment as to whether immunity should be given in exchange for the testimony or whether it would be preferable to lose the testimony and retain the right to prosecute the witness for his crime, if evidence showing his participation should be obtained from other sources. At the moment the answer is given the prosecutor would unwittingly have given immunity. * * *"

The answer to these considerations of expediency [and to all of the others asserted by the Government in its brief in the pages cited] is found in the fact that the statute on its face does not give to the inquiring prosecutor any such veto entitling him to "grant" or "withhold" immunity from the witness. So far as the plain words of the statute are concerned, the inquiring prosecutor and all other prosecutors derive therefrom nothing but a positive and clear mandate not to prosecute the witness in the circumstances enumerated. The Government in its argument is merely complaining about the consequences of the absolute immunity from prosecution earned by the witness upon his compliance with its provisions.

The potential prosecutors of collateral crimes disclosed by a witness's testimony cannot prosecute the

witness for such crimes for the simple and sufficient reason that the statute says that he may not be prosecuted and not because a particular prosecutor "elected" to "grant" the witness immunity for the collateral crimes of which the inquiring prosecutor may not even have known until the answer of the witness was elicited and in which he may have had no interest. See *United States v. Molasky*, 118 F. (2d) 128, 133-137, C. C. A. 7, 1941.

The prosecutor asking the questions is likewise barred from prosecuting the witness for the crime under investigation for exactly the same reason—such prosecution is barred by the statute. The immunity of the witness is there earned by his giving the testimony under the conditions stated in the statute—and the activities of the questioning prosecutor have no other or different consequences in respect of the matter under investigation than they have in the case of collateral crimes disclosed by the testimony.

Not only does the *Skinner* case clothe the inquiring prosecutor with this option but it also imposes upon the witness an even more tenuous "option," stated by Judge Grubb as follows:

"The witness is clothed with an option to testify without asserting his privilege, in which event his testimony is voluntary, and entitles him to no immunity, or to testify only after the assertion of his privilege, and after its denial to him, in which event the evidence given by him is compulsory and entitles him to immunity. The government is entitled to know which option the witness selects." (218 Fed. 870, 878.)

Of course Judge Grubb could have reached this conclusion only by assuming the legal necessity of asserting the claim of constitutional privilege—which was the very question in issue.

We assert flatly that what Judge Grubb leaves to the witness here is no option at all but an obvious trap to

ensnare him. It must be a trap unless all witnesses are to be held possessed of legal competence sufficient to enable them to uniformly and correctly decide the very legal question presented to this Court in the case at bar. The record in this case shows affirmatively that appellees had no such legal competence (R. 10).

Under the Fifth Amendment the witness's option is to testify or to remain silent. The statute in question destroyed that option by requiring disclosure and forbidding silence. As a substitute for this historical and fundamental option Judge Grubb in that opinion and the Government here cut out of whole cloth and without citation of authority a so-called option under which the witness is relegated to a choice—which is no choice—either to testify or to testify. Presumably under the “coextensiveness” theory of the Government this pseudo-option is coextensive with the constitutional option of the witness either to testify or to remain silent—a conclusion with which witnesses will not readily agree.

And as though there were not sufficient sophistries already in the opinion, Judge Grubb says:

“If the witness fails to assert his privilege, the Government would have the right to assume that immunity was not desired by him, and that permitting him to testify would not be attended with that result.”

Such an assumption, adopted by the Government throughout its argument (Br. p. 22), could obviously be made only if the witness in failing to assert his privilege was under a legal duty to assert it. But that was the precise question in issue in the *Skinner* case, and is the precise issue here—and Judge Grubb there, and the Government here, assume as a fact the existence of such a duty. As a corollary Judge Grubb must have assumed as a fact the co-existence of a legal duty on the part of the witness not to rely on the express provisions of the statute.

The assumptions indulged by Judge Grubb and urged

by the Government here are based upon the further assumption that Congress intended by this statute to trap all forthright witnesses who, not intending to waive any of their rights, constitutional or statutory, give testimony in strict accordance with the express provisions of the statute and in a *bona fide* belief that by so testifying they will earn the absolute immunity proffered by the very words of the statute. We think no citation of authorities is needed in support of our view that such an intent cannot be imputed to Congress.

The final and complete answer to these question-begging assumptions of the court in the *Skinner* case is found in the fact that this Court indulged precisely the opposite presumption in the case of *Cameron v. United States*, 231 U. S. 710, 720. In that case testimony shielded by the limited immunity provisions of Section 860 was presumed by this Court to have been given by the witness in reliance upon that statute. That same assumption must necessarily be made in the case at bar, and for the reasons given, the *Skinner* case, which is the Government's leading authority, stands discredited and should not be followed by this Court.

Judge Hutcheson in *United States v. Pardue*, 294 Fed. 543, a soundly reasoned opinion on the precise question here in issue made the following searching observations on the *Skinner* opinion (p. 546):

"Judge Grubb, in the *Skinner* case, stands alone in the position which he there takes. While his opinion presents a splendid argument against the wisdom of the immunity statutes as they now are, and a good suggestion to the legislative authorities for an amendment of them, it presents, in my opinion, no judicial ground for refusing to apply the statute as written. It by judicial interpretation writes into a statute in derogation of a constitutional right, a limitation not therein contained, and which the ordinary mind, to which the statute is addressed, could not have supposed was contained in it. It to an extent follows the

Draconian principle of writing the law in characters so fine that no one can read it, and thereby putting the government in a better position to take the unwary ones into its net. It magnifies the fault of the defendant, while it minimizes the bad faith of the government. It puts the seal of condemnation upon the offense against the general laws of which the defendant is charged, but it approves double dealing and evasion on the part of the government in the matter of a man's constitutional protection, which right reason and sound discrimination cannot, in my opinion, sustain."

In the light of the foregoing we think it unnecessary to comment upon the cases following the *Skinner* decision and set forth in the Government's brief, page 23. We point out, however, that in the last case decided in the Southern District of New York, *United States v. Greater New York Live Poultry Chamber of Commerce*, 33 F. (2d) 1005, 1006 (1929), the Court, through Judge Augustus Hand, made the following comment upon the necessity of defendants claiming their privilege of silence in order to obtain immunity:

"* * * Upon the words of the statute the argument is with the contention now advanced by the defendants, whose pleas are before me. *United States v. Pardue* (D. C.) 294 F. 543; *United States v. Goldman* (D. C.) 28 F. (2d) 424. These words, however, by repeated judicial construction within this district, have been so limited as to require me to sustain the government's demurrers."

The realistic fact of the matter is that this statute gives the Government, and on its face was intended to give the Government, nothing but a positive mandate, not to prosecute individuals who come within its expressly limited terms. The only rights and duties springing from the statute are the right of the citizen who has had his constitutional privilege peremptorily taken away by the statute to be forever immune from all prosecution for all

matters substantially testified to by him provided he has testified under oath pursuant to Government subpoena, and the only duty on the part of the Government is to see to it that that right of the citizen is protected and respected. In the case at bar by including these two appellees among the defendants in the indictment, after calling them as its witnesses, the Government failed in that duty and now urges upon this Court a recognition of a "duty" on the part of these appellees towards the Government and discourses upon its "rights" and its "option"—as though the rights and duties under the statute were not in exact opposition to the Government's contentions.

II.

The Legislative History of the Antitrust Immunity Statute Shows That Congress Did Not Intend to Require a Witness to Claim the Constitutional Privilege Against Self-Incrimination in Order to Obtain Immunity From Prosecution.

Since the statute is clear and unambiguous, no construction or interpretation of its provisions is necessary or permissible for the reasons above set forth. If, however, this Court should consider the statute to be ambiguous, the prior, and contemporaneous legislative history of the statute shows clearly that Congress did not intend to impose upon a witness the obligation of claiming the constitutional privilege of silence as a condition precedent to the earning of immunity.

A. Section 860 of the Revised Statutes Did Not Require a Witness to Claim His Constitutional Privilege as a Condition Precedent to the Earning of Immunity.

The first immunity statute relating to judicial proceedings was the Act of February 25, 1868, 15 Stat. 37. This statute later became Section 860 of the Revised Statutes, and provided as follows:

“ * * * That no answer or other pleading of any party, and no discovery or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness: *Provided*, That nothing in this act shall be construed to exempt any party or witness from prosecution and punishment for perjury committed by him in discovering or testifying as aforesaid.”

As stated in the Government's brief (p. 9): “This Act applied generally to all judicial proceedings and provided in effect that no evidence obtained from a witness would subsequently be used against him in a criminal proceeding.” Section 860 was in full force and effect in 1903 and 1906 and was not repealed until 1910.⁴

In the case of *Tucker v. U. S.*, 151 U. S. 164, this Court held that the compulsion necessary to earn a witness immunity under Section 860 was the compulsion of a “subpoena, interrogatory or other judicial process” and that the absence of these requirements rendered testimony voluntary. At page 168 this Court said:

“ ‘Discovery or evidence obtained from a party or witness by means of a judicial proceeding’ includes only facts or papers which the party or witness is

4. Act of May 7, 1910, c. 216, 36 Stat. 352.

compelled by subpoena, interrogatory, or other judicial process to disclose, whether he will or not; and is inapplicable to testimony voluntarily given, or to documents voluntarily produced."

This case was followed in *Hammond Lumber Co. v. Sailors' Union of the Pacific*, 167 Fed. 809 (C. C. N. D., Cal., 1909), where the Court had under consideration the question whether the witness was required to claim his constitutional privilege to earn the immunity afforded by Section 860. In holding that such claim need not be asserted the Court said at p. 824:

"Of course, the statute would not protect one against a discovery made or evidence given voluntarily, and without necessity; but here the evidence was obtained in obedience to a subpoena, requiring the witness to attend and testify, and the evidence given under such circumstances cannot be said to have been given voluntarily, within the meaning of such a statute; and this I take to be the effect of *Tucker v. United States*, 151 U. S. 164, 14 Sup. Ct. 299, 38 L. Ed. 112."

Mr. Justice Holmes sitting as Circuit Justice for the Circuit Court of Appeals, First Circuit, held in *Johnson v. U. S.* (163 Fed. 30; 1908) that bankruptcy schedules filed by the bankrupt, whether in a voluntary or involuntary proceeding were protected by Section 860 and could not be used against the bankrupt in the Government's criminal prosecution of him for concealing assets from the trustee.

Similarly this Court in the case of *Cameron v. U. S.*, 231 U. S. 710, held that the use of testimony given by the bankrupt in his bankruptcy proceedings violated the immunity guaranteed under Section 860 and constituted reversible error.

The conclusion is inescapable that no claim of privilege was required of a witness in order to earn the immunity afforded by Section 860 and it is equally clear that such immunity to the extent granted was earned by the witness upon compliance with the statutory provisions.

The Government itself in the *Counselman* Case took the position that Section 860 required no claim of privilege since the section excluded the subsequent use of both voluntary and involuntary admissions of a witness. The following attitude of the Government appears at page 555 of the *Counselman* report (142 U. S.):

"This section is taken from the act of February 25, 1868, 15 Stat. 37, c. 13, entitled 'An Act for the Protection in certain Cases of Persons making Disclosures as Parties, or testifying as Witnesses.' Before its passage voluntary admissions were always admissible in evidence against an accused. The Fifth Amendment sought only to preclude the use of involuntary testimony, while the act in terms excludes both voluntary and involuntary admissions. Thus, instead of invading, it adds to the guaranties of the Constitution, and is a new safeguard for individual rights and liberties."

As stated in the Government's brief (pp. 10-11), this Court in *Counselman v. Hitchcock*, 142 U. S. 547, held that Section 860 did not deprive the witness of his constitutional privilege since, for the reasons there stated, the statute did not afford the witness absolute immunity from subsequent prosecution. This Court did not, as stated in the Government's brief, hold the statute unconstitutional. Following the *Counselman* decision, the witness clearly had the option of either claiming his constitutional privilege of silence and not testifying or of testifying and thereby obtaining immunity under Section 860.

B. The Antitrust Immunity Act of February 25, 1903, Did Not Require a Witness to Claim His Constitutional Privilege as a Condition Precedent to the Earning of Immunity.

Following the decision of this Court in the *Counselman* case, Congress passed the Act of February 11, 1893, 27 Stat. 443 (49 U. S. C. 46), providing for immunity under proceed-

ings conducted under the Interstate Commerce Act. As stated in the Government's brief, the Congressional purpose of that Act was to meet the objection raised by this Court in the *Counselman* case. The purpose, therefore, must have been to compel the giving of testimony since, as stated above, the decision in the *Counselman* case still left the witness with the option of giving or refusing to give testimony. That such was the Congressional purpose was recognized by this Court in *Brown v. Walker*, 160 U. S. 591, where this Court held that a witness confronted with the immunity provisions of the Interstate Commerce Act could not refuse to testify. This Court held (pages 601-602) that those provisions removed from the purview of the self-incrimination clause of the Fifth Amendment the class of persons within the terms of the statute, and in effect constituted a legislative grant of general amnesty to such persons.

In February, 1903, the first of the immunity acts in issue in the case at bar was passed. Shortly thereafter, in the case of *Hale v. Henkel*, 201 U. S. 43, this Court was asked to determine whether under that act, in an anti-trust investigation, a witness could stand upon his constitutional privilege of silence, or whether he must answer. Referring to the decision in the *Brown* case, this Court held that the witness must testify, because the act afforded (page 67) "absolute immunity against prosecution for the offense to which the question related, and deprived the witness of his constitutional right to refuse to answer."

In the same year as the *Hale* decision, the court in *United States v. Armour and Company*, 142 Fed. 808 (D. C. N. D., Ill., 1906), considered the conditions essential to the earning of immunity under the Act of February 25, 1903. The Government there argued that the compulsion necessary was the "compulsion furnished by the subpoena and oath" (p. 824). The Court there reached three conclusions: (1) Witnesses were immune from prosecution, even though

they had not testified pursuant to subpoena; (2) witnesses were immune from prosecution even though they testified without the sanction of an oath; and (3) immunity flowed to witnesses by force of the statute itself and without the necessity of any claim therefor by the witnesses.

The *Armour* opinion discloses that the Department of Justice contended that the witnesses should have resisted the Government officer and thereby have compelled him to issue subpoenas and to place them under oath. The opinion further discloses that the Department of Justice, on the hearing, conceded that the witnesses were not required to make any claim to entitle them to immunity from prosecution. In this connection the court said:

"If I am right in saying that immunity flows from the law without any claim on the part of the defendant—and at different times that has been conceded here in argument—then no act of any kind on his part which amounts to a claim of immunity, which amounts to setting up a claim of immunity, is demanded by the law. The law never puts a premium on contumacy." (Italics ours.)

C. The Congressional Debates on the Act of June 30, 1906, Conclusively Show That Congress Did Not Intend to Impose the Requirement of a Claim of Constitutional Privilege as a Condition Precedent to the Earning of Immunity.

The executive and legislative branches of the Government immediately took cognizance of the *Armour* decision. The President of the United States, in a message to Congress,⁵ stated that it had

"... been supposed that the immunity conferred by existing laws was only upon persons who, being subpoenaed, had given testimony or produced evidence as witnesses ..."

5. 40 Cong. Rec. 5500 (1906).

He recommended that Congress pass a declaratory act stating its real intention. Accordingly bills were introduced in each house resulting in the Act of June 30, 1906. The Congressional debates on these bills show beyond argument that

1. The bill substantially as passed was prepared by the Department of Justice itself;

2. The purpose of the bill, and its only purpose, was to establish definite standards under which immunity would be granted witnesses; and

3. The standard set forth was the taking of incriminating testimony of a natural person, under oath and pursuant to subpoena.

Senator Knox, the sponsor of the Senate bill, commented in part as follows as to the benefits to be derived from the bill:

"Mr. President, the whole purpose of this bill is to define the right of the witness as we thought it was defined in the statute which I have read, and to say, as the statute said, but to say it even more clearly and emphatically, that the immunity shall only extend to witnesses who have been subpoenaed to produce books and papers or subpoenaed to give testimony."

Mr. Littlefield, sponsor of the bill in the House, similarly commented in part as follows:

"* * * Of course, if they make an inquiry, and the party inquired of does not see fit to testify unless he is formally summoned and gives testimony on oath, it would establish a legal standard that would protect him and place the Government in a position where they would know what they were doing. * * *

"* * * And the purpose of this legislation is simply to have a definite record, so that the Government may know when it is giving immunity and so that the party who is getting immunity may know when he is entitled to it."

6. 40 Cong. Rec. 7657-58 (1906).

7. 40 Cong. Rec. 8738-39 (1906).

8. 40 Cong. Rec. 8740 (1906).

Further extracts from the debates on these bills are set forth in an appendix hereto attached. The Congressional Record discloses that no member of Congress in discussing these bills even mentioned the necessity of a claim of privilege as a condition precedent to the earning of immunity.

As shown both in the contemporaneous judicial and legislative history of the Act of June 30, 1906, the President of the United States, the Department of Justice, the Interstate Commerce Commission and both houses of Congress apparently believed that the decision of the Court in the *Armour* case left the Act of February 25, 1903, in such a way that neither the Government nor the witness could thereafter determine precisely when that section applied and when it did not apply. The demand of the President and of the Attorney General was for objective, specific standards—measuring rods by which for all time both the witness and the Government could promptly determine when the witness would be immune from prosecution and when he would not be immune.

The standards sought were, of course, standards for determining precisely what testimony should be considered voluntary and therefore not within the purview of the statute and what testimony should be considered compulsory and hence within the scope of the statute. In response to this demand Congress enacted the Act of June 30, 1906, which expressly extends the right of immunity only to natural persons who testify under oath pursuant to subpoena.

In the face of the establishment by Congress of these express standards of compulsion the Government asserts and asks this Court to hold that there is another unexpressed hidden standard without which the statute cannot operate.

The Government throughout its brief places emphasis upon the admitted necessity of a claim of privilege on the

part of a witness under the Fifth Amendment and upon the requirement of such a claim expressly appearing in the immunity provisions to be found in some recently enacted statutes administered by various governmental agencies (Br. 28). The claimed effect of this argument is that Congress in 1906 must be held to have been then legislating having in mind the necessity of the assertion of such a claim under the Constitution,—a hypothesis which it is claimed is supported by the form of these several immunity provisions enacted thirty years later.

This method of argument has been questioned by this Court: "Suggestive as this analysis is, it is entitled to little weight. No mere collation of other statutes can be decisive in determining what the instant statute means. The meaning of each must be closely related to the time and circumstance of its use." *United States v. Stewart*, 311 U. S. 60, 69, and see also *Federal Trade Commission v. Pante Bros. Inc.*, 312 U. S. 349.

The foregoing observation is particularly applicable to a collation of immunity provisions found in statutes administered by governmental agencies because of the wide differences, procedural and otherwise, existing in such statutes. It is pertinent, however, to suggest that there is no uniform immunity statute. Without attempting to enumerate the many differences in immunity statutes, a cursory examination of them will disclose that such statutes differ widely in respect of the persons before whom and the forum in which the testimony shall be given. In some statutes the requirement of a subpoena is explicit, while in other this requirement is not expressed,⁹ and in one statute at least the requirement is "in obedience to the subpoena or lawful requirement of the Commission."¹⁰ Like variations

9. Federal Trade Commission Act, September 26, 1914, 38 Stat. 722, 15 U. S. C. 49; Securities Act, May 27, 1933, 48 Stat. 86, 15 U. S. C. 77v(c).

10. Federal Communications Act, June 19, 1934, 48 Stat. 1096, 47 U. S. C. 406(j).

appear in respect of the requirement of testifying under oath.

It is therefore impossible to derive any general conclusions from these variegated immunity statutes having application to entirely diverse administrative situations. The argument of the Government adds nothing to the picture except to indicate one difference among many others which Congress has seen fit to provide. However valid an argument may be in pointing out language differences in statutes to demonstrate a divergence of statutory meaning, logic and authority rebel against pointing out differences to prove identity of meaning.

Conclusion.

For the above reasons it is respectfully submitted that the judgment of the Court below was correct and should be affirmed.

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APPENDIX.

In the Senate, in response to a request for "some statement as to the present state of the law and as to the benefits to be derived from the bill," Senator Knox, replied in part as follows:

"Mr. Knox. Mr. President, the purpose of this bill is clear, and its range is not very broad. It is not intended to cover all disputed provisions as to the rights of witnesses under any circumstances, except those enumerated in the bill itself. Senators are fully aware that under the interstate-commerce act and under the act creating the Department of Commerce and Labor, the Interstate Commerce Commission, in the first instance, and the Commissioner of Corporations, in the second instance, are authorized by the law to compel witnesses to appear before the Commission and the Commissioner, respectively, to disclose their books and papers, and to give evidence in relation to transportation companies and concerns engaged in interstate commerce whether or not the testimony which they disclose incriminates them. In order that that law might be made effectual under the Constitution the statute gave witnesses so appearing and testifying or producing books and papers *complete immunity* from prosecution by reason of anything that they might disclose or because of any of the transactions with which their testimony might be concerned."¹ (Italics ours.)

Senator Knox then reviewed the history of the immunity statutes. He stated that it had been assumed that under such statutes it was essential that a subpoena should be issued, and continued:

"* * * but it so turned out that in the prosecution of the great beef trust in Chicago, Commissioner Garfield had had some conversations with different members of the beef trust, and some of them had produced books and papers voluntarily or at his request, and,

1. 40 Cong. Rec. 7658 (1906).

notwithstanding the language that the immunity provision was only to extend persons 'subpoenaed' to give testimony and 'subpoenaed' to produce books and papers, the court in Chicago held that they had obtained the immunity by voluntarily disclosing the secrets of their business to Commissioner Garfield.

"Mr. President, the whole purpose of this bill is to define the right of the witness as we thought it was defined in the statute which I have read, and to say, as the statute said, but, to say it even more clearly and emphatically, that the immunity shall only extend to witnesses who have been subpoenaed to produce books and papers or subpoenaed to give testimony." (Italics ours.)

Similar discussion ensued in the House. In response to a request for explanation of the bill, Mr. Littlefield stated (p. 8738):

*"Mr. Littlefield. The Senate bill is a draft made by the Department of Justice for the purpose of establishing a definite standard under which immunity will be granted witnesses * * *"*

Mr. Littlefield was then asked how the Government can obtain information before prosecution, if the employees of a company may refuse to produce books for examination unless given immunity, and if the law provides that nobody shall have immunity unless called as a witness. Mr. Littlefield thereupon replied (pp. 8738-39):

"Mr. Littlefield. There is no trouble at all, so far as the Interstate Commerce Commission is concerned, or the Department of Commerce and Labor, or the Commissioner of Corporations. Each of them has power to summon witnesses, although no case is pending. They have the power under the statute to compel the attendance of witnesses. Of course, if they make an inquiry, and the party inquired of does not see fit to testify unless he is formally summoned and gives testimony on oath, it would establish a legal standard that would protect him and place the Government in a position where they would know what they were do-

ing. He would have a perfect right to insist on that formality being observed. Now, the Attorney-General is of the opinion that under the existing conditions immunity is granted under a great many circumstances when neither party perhaps expected any such result to follow. I make no criticism whatever upon the decision of the judge in Chicago, *but the Attorney-General is very firmly of the opinion that the Department of Justice is bound to be very seriously embarrassed in the enforcement of this legislation unless this definite and specific standard is established by Congress.*

"Now, I can see no practical difficulty. The Attorney-General sees none: The Interstate Commerce Commission, as I understand it, does not apprehend any, and the Commissioner of Corporations does not apprehend any, *provided we have this definite legal standard, so that the Government shall know when it confers immunity, and so that the people who give this testimony or appear in court or produce written evidence shall know when they are entitled to immunity.* Under existing conditions it is a very uncertain and doubtful proposition."³ (Italics ours.)

In concluding the debates, Mr. Littlefield makes the following extremely pertinent remarks (p. 8740):

"Mr. Littlefield. *And the purpose of this legislation is simply to have a definite record, so that the Government may know when it is giving immunity and so that the party who is getting immunity may know when he is entitled to it.* It never ought to be left to the infirmity, to put it no stronger, of the human recollection as to whether a man is or is not entitled to immunity, or whether he has or has not made a statement that bars the Government from prosecuting him for the commission of a crime. The Department of Justice insists that unless they can have this definite standard, the administration of the criminal law is substantially and dangerously embarrassed, and may in many instances be absolutely defeated."⁴ (Italics ours.)

3. 40 Cong. Rec. 8738-39 (1906).

4. 40 Cong. Rec. 8740 (1906).

SUPREME COURT OF THE UNITED STATES.

No. 248.—OCTOBER TERM, 1942.

The United States of America, Appellant, vs. William F. Monja and L. Aubrey Williams.	} Appeal from the United States District Court for the Northern District of Illinois.
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[January 11, 1943.]

Mr. Justice ROBERTS delivered the opinion of the Court.

This is a direct appeal from the District Court for Northern Illinois prosecuted pursuant to the Criminal Appeals Act.¹ It presents a question upon which the lower federal courts have sharply divided.² The question is whether one who, in obedience to a subpoena, appears before a grand jury inquiring into an alleged violation of the Sherman Act, and gives testimony under oath substantially touching the alleged offense, obtains immunity from prosecution for that offense, pursuant to the terms of the Sherman Act, although he does not claim his privilege against self-incrimination.

The Sherman Act³ provides in part:

"no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts [the Interstate Commerce Act, the Sherman Anti-trust Act, and other acts]; *Provided further*, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

That statute was supplemented by the Act of June 30, 1906,⁴ which, so far as material, is

¹ Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 18 U. S. C. 682.

² Compare *United States v. Armour & Co.*, 142 Fed. 808; *United States v. Skinner*, 218 Fed. 870; *United States v. Elton*, 222 Fed. 428; *United States v. Ize*, 290 Fed. 517; *Johnson v. United States*, 5 F. 2d 471; *United States v. Lay Fish Co.*, 13 F. 2d 136; *United States v. Greater New York Live Poultry C. of C.*, 33 F. 2d 1005, with *United States v. Pardue*, 294 Fed. 543; *United States v. Ward*, 295 Fed. 576; *United States v. Moore*, 15 F. 2d 593; *United States v. Goldman*, 28 F. 2d 424.

³ Act of February 25, 1903, 32 Stat. 854, 904, 15 U. S. C. 32.

⁴ 34 Stat. 798, 15 U. S. C. 33.

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"... under the immunity provisions [of the above Act and others] immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."

An indictment was returned charging corporations and individuals, including the two appellees, with conspiracy to fix prices in violation of the Sherman Act. The appellees filed special pleas in bar, each alleging that, in obedience to a subpoena duly served, he appeared as a witness for the United States before the grand jury inquiring respecting the matters charged in the indictment, and gave testimony substantially connected with the transactions covered by the indictment. No question is made but that the testimony so given did substantially relate to the transactions which were the subject of the indictment.

The United States demurred to the pleas as insufficient, since neither alleged that the witness asserted any claim of privilege against self-incrimination and therefore neither the Fifth Amendment of the Constitution nor the immunity statute could avail him.

The District Court overruled the demurrers on the ground that the plain mandate of the statute precluded prosecution of the appellees whether they had claimed the privilege or not. We hold that the decision was right.

Beyond dispute the appellees were entitled to immunity from prosecution if the statute is to be given effect as it is written. We are asked, however, to read into it a qualification to the effect that immunity is not obtained unless the privilege against self-incrimination is claimed. Inasmuch as the statute is addressed to this privilege; and the privilege is accorded by the Fifth Amendment, it is said that if immunity is offered as a substitute for the privilege, the immunity, like the privilege, ought to be claimed; that thus the statute and the Fifth Amendment, which are *pari materia*, will be given a consistent construction.

In the second place, it is urged that qualification of the forthright terms of the statute is necessary in order to avoid an unreasonable, unfair, and unintended result. The argument runs that if the statute is construed automatically to grant immunity without a claim of privilege, the prosecutor is at a disadvantage since he does not know whether, or to what extent, a witness may have participated in a crime; and so runs the risk of unintentionally affording immunity. On the other hand, so it is said, the

witness has full knowledge as to the nature of his own conduct, and as to his possible incrimination by testimony, and it is not unfair to require him to claim his privilege and so put the prosecutor on notice that, if he insists upon the testimony, the witness will obtain immunity.

The well understood course of legislation before and after the adoption of the statute involved, and the legislative history, compel rejection of the contentions.

The Fifth Amendment declares that "No person . . . shall be compelled in any criminal case to be a witness against himself." An investigation by a grand jury is a criminal case.⁵ The amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been "compelled" within the meaning of the Amendment.⁶

More than seventy years ago Congress was advised that, in suits prosecuted by the United States, where evidence had been sought from certain persons, to be used by the Government, they had interposed a claim of privilege which had been sustained by the courts.⁷ In order to forestall the obstruction and delay incident to judicial determination of the validity of the witness' claim, and in order to obtain necessary evidence, even though the claim were well founded, Congress adopted the Act of February 25, 1868,⁸ which became R. S. 860. This Act applied to all judicial proceedings and provided, in effect, that no evidence obtained from a witness could be used against him in a criminal proceeding.

This court, in *Counselman v. Hitchcock*, 142 U. S. 547, held the Act unconstitutional because, while it prevented the use of the evidence against the witness, it did not preclude his prosecution as a result of information gained from his testimony. The court indicated clearly that nothing short of absolute immunity would justify compelling the witness to testify if he claimed his privilege.

The original Interstate Commerce Act⁹ contained an immunity provision in the form held invalid in the *Counselman* case. To meet the decision in that case, Congress passed the Act of February

⁵ *Counselman v. Hitchcock*, 142 U. S. 547, 562.

⁶ *United States ex rel. Vajtauer v. Commissioner*, 273 U. S. 103, 113.

⁷ Cong. Globe, 40th Cong., 2d Sess., pp. 950-51, 1774.

⁸ 15 Stat. 37.

⁹ 24 Stat. 383.

11, 1893,¹⁰ which applied only to proceedings under the Interstate Commerce Act. (This statute, however, became the model for immunity provisions which were enacted at various times up to 1933, including the Act of February 25, 1903, *supra*, with which we are here concerned. This court sustained the constitutionality of these Acts.¹¹

In 1906 the District Court for the Northern District of Illinois held, in *United States v. Armour & Co.*, 142 Fed. 808, that a voluntary appearance, and the furnishing of testimony and information without subpoena, operated to confer immunity from prosecution under the Sherman Act. The court held that the immunity conferred was broader than the privilege given by the Fifth Amendment. The decision attracted public interest since, if it stood, one could immunize himself from prosecution by volunteering information to investigatory bodies. Congress promptly adopted the Act of June 30, 1906, *supra*, providing that the immunity should only extend to a natural person who, in obedience to a subpoena, testified or produced evidence under oath. The Congressional Record shows that the sole purpose of the bill was exactly what its language states.¹² Senator Knox, who sponsored the bill, stated: "Mr. President, the purpose of this bill is clear, and its range is not very broad. It is not intended to cover all disputed provisions as to the rights of witnesses under any circumstances, except those enumerated in the bill itself."

It is evident that Congress, by the earlier legislation, had opened the door to a practice whereby the Government might be trapped into conferring unintended immunity by witnesses volunteering to testify. The amendment was thought, as the Congressional Record demonstrates, to be sufficient to protect the Government's interests by preventing immunity unless the prosecuting officer, or other Government official concerned, should compel the witness' attendance by subpoena and have him sworn.

Not until 1933 did Congress evidence an intent that if the witness desired immunity he must, in addition, assert his constitutional privilege. In a series of acts adopted between 1934 and 1940 an additional provision was inserted adding this requirement.¹³ These acts indicate how simple it would have been to add a similar pro-

¹⁰ 27 Stat. 443, 49 U. S. C. 46.

¹¹ *Brown v. Walker*, 161 U. S. 591.

¹² 40 Cong. Rec. 5500, 7657-58, 8734-39-40.

¹³ See e.g. Securities Exchange Act, 48 Stat. 906, 15 U. S. C. 78n(d); Investment Advisers Act, 54 Stat. 853, 15 U. S. C. 80b-9(d).

vision applicable to the Interstate Commerce Act, the Sherman Act, and others which have been allowed to stand as originally enacted save for the amending Act of 1906.¹⁴

The legislation involved in the instant case is plain in its terms and, on its face, means to the layman that if he is subpoenaed, and sworn, and testifies, he is to have immunity. Instead of being a trap for the Government, as was the original Act, the statutes in question, if interpreted as the Government now desires, may well be a trap for the witness. Congress evidently intended to afford Government officials the choice of subpoenaing a witness and putting him under oath, with the knowledge that he would have complete immunity from prosecution respecting any matter substantially connected with the transactions in respect of which he testified, or retaining the right to prosecute by foregoing the opportunity to examine him. That Congress did not intend, or by the statutes in issue provide, that, in addition, the witness must claim his privilege, seems clear. It is not for us to add to the legislation what Congress pretermitted.

We have referred to the diversity of views amongst the lower courts. The Government insists that this court has settled the question in favor of its view. Its reliance is upon *Heike v. United States*, 227 U. S. 131. That case, however, decided only that the immunity conferred by the legislation in question was intended to protect the witness to the same extent that the Fifth Amendment protects him. The question was whether the immunity extended to prosecution for crimes with which the matters testified to were but remotely connected. This court held that, as the Amendment did not justify a claim of privilege against such remote contingencies, the immunity should be likewise construed not to reach them. The question of the necessity of a witness before an investigatory body claiming his privilege in order to earn his immunity was not decided.

The judgment is affirmed.

¹⁴It may be, that, due to the thoroughness of preliminary investigation in the classes of cases in question, Congress has believed that the Government's representatives needed no further warning of the result of subpoenaing a witness and examining him under oath.

SUPREME COURT OF THE UNITED STATES.

No. 248.—OCTOBER TERM, 1942.

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[January 11, 1943.]

Mr. Justice FRANKFURTER, dissenting.

It is beyond dispute that the Constitution does not compel Congress to afford immunity from prosecution to those who testify without invoking the constitutional privilege against self-incrimination. The question for decision here is whether, by the Act of June 30, 1906, 34 Stat. 798, amending the immunity provision of the Act of February 25, 1903, 32 Stat. 904, Congress granted more than the Constitution requires and offered a "gratuity to crime", *Heike v. United States*, 227 U. S. 131, 142, by conferring immunity to persons who testify without claiming the protection of the privilege against self-incrimination and who in no way indicate that their testimony is being given in return for the statutory immunity. In other words, did Congress, by that amendment, seek to facilitate the enforcement of law by making "evidence available and compulsory that otherwise could not be got", *ibid.*, or was it passing an act of amnesty?

This question cannot be answered by closing our eyes to everything except the naked words of the Act of June 30, 1906. The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage (see *Amos*, *The Interpretation of Statutes*, 5 Camb. L. J. 163; *Davies*, *The Interpretation of Statutes*, 35 Col. L. Rev. 519), to which lip service has on occasion been given here, but which since the days of Marshall this Court has rejected, especially in practice. *E.g.*, *United States v. Fisher*, 2 Cranch 358, 385-86; *Boston Sand Co. v. United States*, 278 U. S. 41, 48; *United States v. American Trucking*

*Pluchinett, A Concise History of the
Constitution Law, 2d ed., 294-300.*

Ass'ns, 310 U. S. 534, 542-44. A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning. And so we must turn to the history of federal immunity provisions.

The earliest federal statute dealing with immunity is the Act of January 24, 1857, 11 Stat. 155, as amended by the Act of January 24, 1862, 12 Stat. 333. This legislation, relating to testimony before either House of Congress, furnished a model for later immunity provisions. Congress was careful to state precisely what it was for which immunity was given: "No witness shall hereafter be allowed to *refuse to testify* to any fact or to produce any paper. . . ." 11 Stat. 156 (*italics added*). It was the refusal to testify, not the refusal to appear as a witness, which Congress took away and for which it gave immunity.

Duty, not privilege, lies at the core of this problem—the duty to testify, and not the privilege that relieves of such duty. In the classic phrase of Lord Chancellor Hardwicke, "the public has a right to every man's evidence"¹ The duty to give testimony was qualified at common law by the privilege against self-incrimination. And the Fifth Amendment has embodied this privilege in our fundamental law. But the privilege is a privilege to withhold answers and not a privilege to limit the range of public inquiry. The Constitution does not forbid the asking of criminative questions. It provides only that a witness cannot be compelled to answer such questions unless "a full substitute" for the constitutional privilege is given. *Counselman v. Hitchcock*, 142 U. S. 547, 586. The compulsion which the privilege entitles a witness to resist is the compulsion to answer questions which he justifiably claims would tend to incriminate him. But the Constitution does not protect a refusal to obey a process. A subpoena is, of course, such a process, merely a summons to appear. 8 Wigmore on Evidence (3d ed.) p. 106, § 2199. There never has been a privilege to

¹ Debate in the House of Lords on the Bill to indemnify Evidence, 12 Hansard's Parliamentary History of England, 675, 693, May 25, 1742, quoted in 8 Wigmore on Evidence (3d ed.) p. 64, § 2192.

disregard the duty to which a subpoena calls. And when Congress turned to the device of immunity legislation, therefore, it did not provide a "substitute" for the performance of the universal duty to appear as a witness—it did not undertake to give something for nothing. It was the refusal to give incriminating testimony for which Congress bargained, and not the refusal to give any testimony. And it was only in exchange for self-incriminating testimony which "otherwise could not be got" (*Heike v. United States*, 227 U. S. 131, 142) because of the witness's invocation of his constitutional rights that Congress conferred immunity against the use of such testimony.

Instead of giving more than the constitutional equivalent for the privilege against self-incrimination, Congress for a long time did not give enough. See *Counselman v. Hitchcock*, 142 U. S. 547, invalidating the Act of February 25, 1868, 15 Stat. 37, R. S. § 860, the first immunity statute relating to judicial proceedings. In order to remove the gap between what this Act gave and what the Constitution was construed to require, Congress promptly passed the Act of February 11, 1893, 27 Stat. 443, in order not to interrupt the effective enforcement of the Interstate Commerce Act. As the debates reveal, Congress acted on its understanding of what this Court in the *Counselman* decision indicated was an adequate legislative alternative. See remarks of Senator Cullom, July 18, 1892, 23 Cong. Rec. 6333. The 1893 Act followed the language of the Act of January 24, 1857, by providing that "no person shall be *excused from attending and testifying* or from producing books" 27 Stat. 443 (italics added). And in 1896 this Court, in *Brown v. Walker*, 161 U. S. 591, 595, found that the 1893 Act "sufficiently satisfies the constitutional guarantee of protection". There was no indication of any belief that Congress had given anything more than it had to give—and, indeed, only a bare majority of the Court thought that the statute had given as much as the Constitution required.

Certainly until the beginning of this century, therefore, Congress displayed no magnanimity to criminals by affording amnesty for their crimes. Indeed, so sensitive has Congress been against immunizing crime that it has not entrusted prosecutors generally with the power to relieve witnesses from prosecution in exchange for incriminating evidence against others. But as part of the legislative program for the correction of corporate abuses, Con-

gress in February 1903 included provisions for immunity in three additional measures, the Act of February 14, 1903, 32 Stat. 828, establishing the Department of Commerce and Labor and conferring upon the Commissioner of Corporations the investigatory powers possessed by the Interstate Commerce Commission, the Elkins Amendment of February 19, 1903, 32 Stat. 848, to the Interstate Commerce Act, and the Act of February 25, 1903, 32 Stat. 903-04, making large appropriations for the enforcement of the Interstate Commerce Act, the Sherman Law, and other enactments. It is this latter provision, as amended by the Act of 1906, which is immediately before us.

It was not until the startling decision of District Judge Humphrey in *United States v. Armour & Co.*, 142 Fed. 808, that the suggestion was seriously made that Congress, in studiously fashioning a constitutional equivalent for the privilege against self-incrimination, was playing Lady Bountiful to criminals. The particular concerns which the *Armour* opinion stirred must be heeded because they provoked the Act of 1906. The meaning of that legislation is lost unless derived from the circumstances which gave rise to it. The case arose out of a proceeding begun under the Act of February 14, 1903, 32 Stat. 825, creating the Department of Commerce and Labor. Section 8 of that Act provided that the Secretary of Commerce and Labor shall "from time to time make such special investigations and reports as he may be required to do by . . . either House of Congress". In obedience to a resolution of the House of Representatives, the Secretary directed the Commissioner of Corporations to investigate the causes of the low prices of beef cattle. Accordingly, the Commissioner instituted such an inquiry. At a conference with officers of the packing corporations and their counsel, the Commissioner explained the purposes and scope of his investigation. He informed them that he was acting independently and not in cooperation with the Department of Justice in its contemporaneous proceeding against the "Beef Trust" for alleged violations of the Sherman Law, and that any evidence obtained from the packers would not be given to the Department but would be reported only to the President for his appropriate use. (H. Doc. No. 706, 59th Cong., 1st Sess., p. 6.) Thereupon the Commissioner's agents were afforded an opportunity to examine the packers' books and papers.

Subsequently, an indictment under the Sherman Law was found against the packing corporations and their officers. Pleas in bar

were filed, alleging in substance that, as a result of the investigation made by the Commissioner of Corporations, the defendants had obtained immunity from prosecution for the offenses charged in the indictment. Judge Humphrey sustained these pleas as to the individual defendants on the ground that the information furnished by the defendants brought into operation the immunity provision of the Act of February 14, 1903, which incorporated by reference the Act of February 11, 1893, 27 Stat. 443, relating to testimony before the Interstate Commerce Commission. Judge Humphrey reached his conclusion by attributing to Congress in passing the Act of February 11, 1893, a purpose which this Court later unanimously rejected in *Heike v. United States*, 227 U. S. 131. For while Judge Humphrey correctly held that "the privilege of the amendment permits a refusal to answer", he also stated, quite incorrectly and without any warrant in the language, legislative history or policy of the Act, that the statute "wipes out the offense about which the witness might have refused to answer." 142 Fed. at 822. In other words, the district judge treated the immunity act as though it were an act of amnesty, and that is precisely what this Court in the *Heike* case said it was not: "Of course there is a clear distinction between an amnesty and the constitutional protection of a party from being compelled in a criminal case to be a witness against himself. Amendment V. But the obvious purpose of the statute [the Act of February 25, 1903] is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned. We believe its policy to be the same as that of the earlier act of February 11, 1893, c. 83, 27 Stat. 443, which read 'No person shall be excused from attending and testifying,' &c. 'But no person shall be prosecuted,' &c., as now, thus showing the correlation between constitutional right and immunity by the form." 227 U. S. at 142.

Judge Humphrey doubtless fell into error because he treated the immunity provision as subsidiary to the main purpose, as he conceived it, of the Act establishing the Department of Commerce and Labor. He believed "the primary purpose" of that Act was to "secure information for the use of the legislative body". 142 Fed. at 826. It is plain that he did not view the immunity provi-

sions in their true light, that is, as means to facilitate the administration of the criminal law. Whatever justification Judge Humphrey may have had for entertaining such a notion with regard to the Act creating the Department of Commerce and Labor, it certainly has no application to the immunity provisions touching the Interstate Commerce Act and the Sherman Law. Those provisions were enacted as aids in the enforcement of criminal justice; they were not acts of amnesty designed to wipe out criminal offenses.

Acting swiftly to correct the error of the *Armour* decision, the President recommended that "the Congress pass a declaratory act" to set aside Judge Humphrey's misconception of congressional purpose. Message from the President of the United States, April 18, 1906, H. Doc. No. 706, 59th Cong., 1st Sess., p. 3. In so doing, President Theodore Roosevelt was acting upon the advice of Attorney General (soon to become Mr. Justice) Moody. Naturally enough, the declaratory legislation directed itself to the correction of the two evils that Judge Humphrey's opinion projected, namely, to make it clear that immunity should not be afforded for producing corporate documents which could in any event be had because the privilege against self-crimination is not available to corporations, *Wilson v. United States*, 221 U. S. 361, 372-74, and that a person who does not give evidence under the ordinary formalities incident to being a witness was not entitled to immunity. The legislation was responsive to the Government's position, as stated by Attorney General Moody: "Upon these facts [in the *Armour* case] the Government contended that the statutory immunity could be conferred only upon persons subpoenaed by the Commissioner of Corporations who might subsequently give testimony or evidence (in the legal sense of those terms) relating to the subject-matter of the indictment." H. Doc. No. 706, 59th Cong., 1st Sess., p. 7.

Such was the limited purpose of the 1906 amendment. Could it be that the President having proposed, and the Congress having enacted, a restrictive declaration regarding the scope of the immunity provision in order to prevent other courts from following the latitudinarian misconception of Judge Humphrey, the President and the Congress, both acting upon the advice of one of the ablest of Attorneys General, were unwittingly betrayed into introducing a new gratuity for witnesses under duty to respond to a subpoena, by giving an amnesty in exchange for the mere response?

For more than seventeen years thereafter it was unquestioned that Congress had given no more than the Constitution required—freedom from prosecution for evidence that could not otherwise be obtained, evidence that was withheld upon claim of constitutional privilege, evidence that was given only because Congress had provided immunity. This was the ruling of all the federal courts which considered the question, courts on which sat some of the ablest judges of their day—Judge Martin in *United States v. Heike*, 175 Fed. 852; Judge Grubb in *United States v. Skinner*, 218 Fed. 870; Judge Hunt in *United States v. Elton*, 222 Fed. 428; and Judge Rose in *Johnson v. United States*, 5 F. 2d 471. The narrow purpose of the 1906 amendment, in the light of the events which gave rise to it, was succinctly set forth by Judge Rose: "Quite clearly this act did only two things and it was intended to do no more. It made it clear that the immunity granted did not inure to the benefit of corporations and that a natural person could not claim it unless he had testified in obedience to a subpoena. It was passed to meet the serious situation which the President and Congress thought had been created by the rulings of Judge Humphrey.

It was clearly not intended to change the previously existing law in any other respect. A construction should not

be given to it which would result in a grand jury or prosecuting officer unwittingly conferring immunity upon a serious offender because in the best of good faith, and with no reason to suppose that he was criminally involved in the transaction, he was subpoenaed to produce some documents or to give some testimony which perhaps could just as well have been obtained from other sources. Unquestionably the witness has the constitutional right to object to testifying. Then it is open to the government to elect whether it will or will not proceed with his examination under the statute, but if it does not, his rights remain as they were before ~~the~~ he was called to the stand." *Johnson v. U. S.*, 5 Fed. 2d 471.

The observations of Judge Grubb in *United States v. Skinner*, 218 Fed. 870, 879, are equally pertinent here: "The witness, in many cases, is alone informed as to whether his evidence will tend to incriminate him. The supposed incrimination may relate to offenses not under investigation by the examining tribunal, and of the existence of which or of the relation of the desired evidence to which the examining tribunal or the government law officer may have no knowledge. The Heike Case is an apt illustration of this possibility.

The witness is likely to have exclusive knowledge as to what facts and what answers may tend to his incrimination, and with reference to what offenses. Again, the witness alone knows whether he willingly gives his evidence for the purpose of exonerating himself, or only with the expectation of receiving immunity therefor. He is therefore in a better position to be called upon to assert his constitutional privilege than is the examining tribunal or the law officer of the government to call upon him to elect to do so. If any hardship attends the imposition of this burden on the witness, it has never been considered weighty enough to relieve him therefrom in exercising his constitutional privilege, prior to the immunity statutes. The immunity granted by the statute is a mere substitute for the constitutional safeguard, and has been held by the Supreme Court to be coterminous with it. There would seem, therefore, to be no reason for a different practice as to the assertion of the privilege where immunity is desired and where the constitutional privilege is insisted upon."

These decisions thus reflected weighty considerations of policy in finding that Congress afforded immunity from prosecution only to the extent that the Constitution required in exchange for a privilege and that Congress was not giving away indulgences.

These considerations of policy were certainly not answered in the opinion of the Texas district court which, in 1923, made the first departure from this uniform construction of the statute. The court held that immunity came merely because one testified in obedience to a subpoena, without any claim, either explicit or implied by the circumstances, that he had a constitutional right to refuse to answer on the ground that he might thereby be incriminated and that the testimony was being given only under compulsion of the immunity statute. *United States v. Pardue*, 294 Fed. 543. The court stated that its position was supported by the weight of authority, citing (1) the decision of Judge Humphrey in the *Armour* case, (2) *United States v. Swift*, 186 Fed. 1002, the opinion in which, so far as it is relevant to the question here, seems to point clearly the other way (see, especially, 186 Fed. at 1016-18); (3) *State v. Murphy*, 128 Wis. 201, which, much questioned originally, has been repudiated by the court which rendered it, *Carchidi v. State*, 187 Wis. 438, and *State v. Grosnickle*, 189 Wis. 17; and (4) a decision of the New York Court of Appeals, *People v. Sharp*, 107 N. Y. 427. In considering "the reasons which should control", the district court was "shocked by the

unconscionableness of the claim . . . that the government can under a statute which . . . grants general amnesty to persons who appear and testify in obedience to a subpoena, compel them to testify, and thereafter break faith with them by denying the protection of the statute to those who testify in exact accordance with its terms." 294 Fed. at 547. Starting with the misconception that the immunity provision was an act of amnesty and not a *quid pro quo* for the constitutional privilege, the District Court readily glided into question-begging by finding that there was a breach of faith in contesting the claim of amnesty.² l. b.

Once the confusion is avoided between an act of amnesty and an act which gives immunity in order "to make evidence available and compulsory that otherwise could not be got" because it could be withheld upon a claim of constitutional privilege, it becomes clear that a witness is not "entrapped" by requiring him to claim his constitutional privilege before affording him a substitute. A witness is no more entrapped by the requirement that he must stand upon his constitutional rights, if he desires their protection, when there is an immunity statute than he is where there is none at all. It is one thing to find that incriminating answers given by a witness were given because in the setting of the particular circumstances he would not have been allowed to withhold them. It is quite another to suggest that one who appears as a witness should, merely because his appearance is in obedience to a subpoena, thereby obtain immunity "on account of any transaction, matter or thing concerning which he may testify", even though the incrimination may relate to a transaction wholly foreign to the inquiry in which the testimony is given and even though the most alert and conscientious prosecutor would not have the slightest inkling that the testimony led to a trail of self-extermination. Such a construction makes of the immunity statute not what its history clearly reveals it to be, namely, a carefully devised instrument for the achievement of criminal justice, but a measure for the gratuitous relief of criminals. The statute reflects the judgment of Congress that "the public has a right to every man's evidence".

² It is significant that the *Heike* case, in which this Court held there was "no reason for supposing that the [immunity] act offered a gratuity to crime", 227 U. S. at 142, was cited neither by the court below in this case, nor by Judge Hutcheson in the *Pardue* case, 294 Fed. 543, nor in any of the cases following the *Pardue* ruling, *United States v. Ward*, 295 Fed. 576, *United States v. Moore*, 15 F. 2d 593, and *United States v. Goldman*, 28 F. 2d 424.

It is not for us to relax the demands of society upon its citizens to appear in proceedings to enforce laws enacted for the public good.

Beginning with the Securities Act of 1933, 48 Stat. 87, Congress has enacted no less than seventeen regulatory measures which contain provisions for immunity from prosecution in exchange for self-incriminating testimony. Of these fourteen, including *inter alia* the Securities Exchange Act of 1934, 48 Stat. 900, the National Labor Relations Act, 49 Stat. 456, the Communications Act of 1934, 48 Stat. 1097, the Public Utility Holding Company Act of 1935, 49 Stat. 832, the Federal Power Act, 49 Stat. 858, and the Civil Aeronautics Act of 1938, 52 Stat. 1022, confer immunity when a person testifies under compulsion "after having claimed his privilege against self-incrimination". Three of these statutes, however, the Motor Carrier Act of 1935, 49 Stat. 550, the Industrial Alcohol Act, 49 Stat. 875, and the Fair Labor Standards Act of 1938, 52 Stat. 1065, do not contain this additional clause—they merely follow the old form customarily used by Congress prior to the Securities Act of 1933. Of course, there is a difference in the language of these statutory provisions. But the process of construing a statute cannot end with noting literary differences. The task is one of finding meaning; and a difference in words is not necessarily a difference in the meaning they carry. The question is not whether these provisions are different, but whether there is significance in the difference. If the difference in language, reflected a difference in the scope of the immunity given, or in the nature of the considerations that moved Congress to make a differentiation, there would surely be some indication, however faint, somewhere in the legislative history of these enactments that some legislator was aware that the difference in language had significance. But there is none.

If Congress saw fit gratuitously to confer immunity to citizens who appear as witnesses in proceedings to enforce the Motor Carrier Act of August 9, 1935, it is hard to understand why it should give such immunity only to those who after asserting their privilege, were pressed to give evidence in proceedings to enforce the Federal Power Act of August 26, 1935, and in proceedings to enforce the Public Utility Holding Company Act which became law the same day, and again should have given the privilege gratuitously in the Industrial Alcohol Act, which became law the following day. The Railroad Unemployment Insurance Act, 52 Stat. 1107, and the Fair Labor Standards Act of 1938, 52 Stat. 1065, both became law the

same day, June 25, 1938. Yet the immunity provision of the former contains the "after having claimed, etc." clause, and that of the latter does not. It is only fair to Congress to assume that if there was a purpose to make a difference in the demands upon citizens when they appear as witnesses under one statute rather than the other, that purpose would have been stated somewhere in the course of the legislative history. But there is a total absence of any indication anywhere that any Congressman had any notion that the enforcement of the Motor Carrier Act of 1935, the Industrial Alcohol Act, or the Fair Labor Standards Act of 1938, called for a different treatment of witnesses in proceedings under these Acts than in enforcement proceedings under the other fourteen Acts. The explanation seems obvious. There are no expressions in the legislative materials to indicate that the legislative purpose varied in this respect between these Acts because there was no difference in purpose.

But the variations in the phraseology employed in the Acts are not to be explained away as just caprices of a single draftsman. The explanation is likely to be found in the manner in which Congress usually acts in adopting regulatory legislation. If a single draftsman had drafted each of these provisions in all seventeen statutes, there might be some reason for believing that the difference in language reflected a difference in meaning. But it is common knowledge that these measures are frequently drawn, at least in the first instance, by specialists (perhaps connected with interested government departments) in the various fields. Provisions in different measures dealing with the same procedural problem not unnaturally, therefore, lack uniformity of phrasing.

We do not have to look very far in order to see how Congress happened to use one form of immunity provision in some of these statutes and another form in others. Consider the evolution of the three statutes which followed the old, pre-1933 form. The Motor Carrier Act of 1935 was enacted as an amendment to the Interstate Commerce Act. What was more natural than that the enforcement provisions of the old Act should be incorporated by reference in providing for the new powers of the Commission. §§ 201, 205e, 49 Stat. 543, 550. And the Industrial Alcohol Act of 1935, so far as its enforcement provisions were concerned, was patterned upon its predecessor, the National Prohibition Act of 1919, 41 Stat. 317, and the draftsman naturally took the immunity provision from that statute.

The Fair Labor Standards Act of 1938 has a more complicated but even more revealing history. Introduced first in the Senate

on May 24, 1937, it carried the explicit provision that a person gains immunity "after having claimed his privilege against self-incrimination". It remained in this form throughout the course of the legislation in both the House and the Senate for nearly a year, when the whole conception of the bill was changed. Everything was struck out after the enacting clause, and the new measure was submitted to the House on April 21, 1938. As part of that new bill, the provision for the attendance of witnesses in the enforcement of the Act simply incorporated by reference the provision of the Federal Trade Commission Act—and obviously this was because the draftsmen of the new bill drew heavily upon the scheme of that Act. But there is an utter want of evidence to support the suggestion that after a year the proponents of this legislation and the committees that grappled with its problems changed their minds as to the extent of the immunity to be afforded to witnesses summoned in proceedings under the Act. Nor is there any evidence in the debates that when Congress finally passed the measure in its present form, it meant to give a greater immunity than that which was provided in the various bills that were before the Senate and the House for a year.

The course taken by the Securities Act of 1933 before it was finally enacted is revealing as to the significance of its immunity provision, the first to depart from the old form. Up to the time that the bills which eventually became the Act emerged from conference, the immunity provision followed the old form. The new formula appears for the first time in the bill reported by the conference. But neither in the conference report nor elsewhere is there any suggestion that the introduction of this phrase imported any new legislative purpose or that it was anything more than a careful rephrasing of a conventional statutory provision. In the case of the Fair Labor Standards Act, as we have seen, the more meticulous phrase, "after having claimed his privilege against self-incrimination", was in all successive bills in both the House and the Senate but it disappeared at the final stage of the enactment of the measure. No one ever suggested, so far as the available materials show, that the change in the formula implied any change as to the intended scope of the immunity provision. Style, not substance, is obviously the explanation. In the case of one statute Congress began with the new form and ended with the old one; in the case of the other it began with the old one and ended with the new. Upon what rational basis can we attribute to Congress an

intention to make the scope of the immunity provision of the one statute vitally different from that of the other?

To attribute caprice to Congress is not to respect its rational purpose when, as here, we find a uniform policy deeply rooted in history even though variously phrased but always directed to the same end of meeting the same constitutional requirement.

I am therefore of opinion that an appearance in response to a subpoena does not of itself confer immunity from prosecution for anything that a witness so responding may testify. There must be conscious surrender of the privilege of silence in the course of a testimonial inquiry. Of course no form of words is necessary to claim one's privilege. Circumstances may establish such a claim. But there must be some manifestation of surrender of the privilege. The prosecutor's insistence upon disclosure which, but for immunity from prosecution, could be withheld is that for which alone the immunity is given. History and reason alike reject the notion that immunity from prosecution is to be squandered by giving it gratuitously for responding to the duty, owed by everyone, to appear when summoned as a witness.

Since the demurrers to the pleas should have been ~~overruled~~ ^{sustained}, the case should be remanded to the district court for appropriate disposition in accordance with the views herein expressed.

Mr. Justice DOUGLAS joins in this dissent.